STATE OF NEW YORK

9002

IN SENATE

June 12, 2018

Introduced by Sen. DILAN -- read twice and ordered printed, and when printed to be committed to the Committee on Rules

AN ACT to amend the elder law, in relation to the long-term care ombudsman program

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section 218 of the elder law, paragraph (b) of subdivision 1 as amended by section 1 of chapter 462 of the laws of 2015, subparagraph 3 of paragraph (c) of subdivision 3 as amended by chapter 95 of the laws of 2004, paragraph (g) of subdivision 3 as added by chapter 462 of the laws of 2015, and subparagraph 2 of paragraph (a) of subdivision 7 as amended by chapter 230 of the laws of 2004, is amended to read as follows:

§ 218. [~~Long term~~] Long-term care ombudsman. 1. Definitions. For the purposes of this section, the following terms shall have the following meanings:

(a) [~~"Local ombudsman" shall mean an individual who is employed by the local entity designated pursuant to subdivision four of this section and who has been approved by the state ombudsman to perform or carry out the activities of the local long term care ombudsman program. The local ombudsman may be either a paid employee or volunteer of the local entity~~] "Administrative action" shall mean any action or decision by an owner, employee, or agent of a long-term care facility, or by a government agency, which affects the provision of service to residents of or applicants for admission to long-term care facilities.

(b) "Immediate family" pertaining to conflicts of interest, shall mean a member of the household or a relative with whom there is a close personal or significant financial relationship.

(c) "Local ombudsman entity" shall mean any entity designated to operate a local long-term care ombudsman program.

[~~(b) "Long term~~] (d) "Long-term care facilities" shall mean residential health care facilities as defined in subdivision three of section twenty-eight hundred one of the public health law[~~,~~]; adult care facilities as defined in subdivision twenty-one of section two of the social

EXPLANATION--Matter in *italics* (underscored) is new; matter in brackets [-] is old law to be omitted.

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services law, including those adult homes and enriched housing programs licensed as assisted living residences, [~~as defined in~~] pursuant to article forty-six-B of the public health law[~~,~~]; or any facilities which hold themselves out or advertise themselves as providing assisted living services and which are required to be licensed or certified under the social services law or the public health law. Within the amounts appropriated therefor, [~~"long term~~] "long-term care facilities" shall also mean managed [~~long term~~] long-term care plans and approved managed [~~long term~~] long-term care or operating demonstrations as defined in section forty-four hundred three-f of the public health law and the term "resident", "residents", "patient" and "patients" shall also include enrollees of such plans.

[~~(c) "State ombudsman" shall mean the state long term care ombudsman appointed by the director pursuant to subdivision three of this section.~~]

(e) "Long-term care ombudsman" or "ombudsman" shall mean a person who:

(1) is an employee or volunteer of the state office for the aging or of a designated local ombudsman entity and represents the state long-term care ombudsman program;

(2) has been verified as having successfully completing a certification training program developed by the state ombudsman; and

(3) has a current designation as a long-term care ombudsman by the state long-term care ombudsman.

(f) "Resident representative" shall mean either of the following:

(1) an individual chosen by the resident to act on behalf of the resident in order to support the resident in decision-making; access medical, social, or other personal information of the resident; manage financial matters; or receive notifications;

(2) a person authorized by state or federal law (including but not limited to agents under power of attorney, representative payees, and other fiduciaries) to act on behalf of the resident in order to support the resident in decision-making; access medical, social, or other personal information of the resident; manage financial matters; or receive notifications;

(3) a legal representative, as used in section 712 of the older Americans act of 1965, as amended; or

(4) the court-appointed guardian or conservator of the resident.

(5) Nothing in this section is intended to expand the scope of authority of any resident representative beyond that authority specifically authorized by the resident, state or federal law, or a court of competent jurisdiction.

(g) "State long-term care ombudsman" or "state ombudsman" shall mean the individual who heads the office of the state long-term care ombudsman and is responsible to personally, or through representatives of the office of the state long-term care ombudsman, fulfill the functions, responsibilities and duties of the office of the state long-term care ombudsman.

(h) "Willful interference" shall mean actions or inactions taken by an individual in an attempt to intentionally prevent, interfere with, or attempt to impede an ombudsman from performing any of the functions or responsibilities of the office of the state long-term care ombudsman.

2. Office of the state long-term care ombudsman established. (a) There is hereby established within the state office for the aging an office of the state [~~long term~~] long-term care ombudsman [~~for the purpose of receiving and resolving complaints affecting applicants, patients and residents in long term care facilities and, where appropriate, referring~~

~~complaints to appropriate investigatory agencies and acting in concert with such agencies~~] which shall be headed by the state long-term care ombudsman, who shall carry out, directly and/or through local ombudsman entities, the duties set forth in this section.

(b) The office of the state long-term care ombudsman is a distinct entity, separately identifiable, and located within the state office for the aging.

(c) The state office for the aging shall provide the long-term care ombudsman program with legal counsel that is adequate, available, has competencies relevant to the legal needs of the program, and is without conflict of interest as determined by the state office for the aging in consultation with the state long-term care ombudsman.

(d) The state office for the aging shall not establish personnel policies or practices which prohibit the ombudsman from performing the functions and responsibilities of the ombudsman, as set forth in this section.

(e) Nothing in this section shall prohibit the state office for the aging from requiring that the state ombudsman, or other employees of the office of the state long-term care ombudsman, adhere to the personnel policies and procedures of the state office for the aging.

3. State [~~long-term~~] long-term care ombudsman. (a) The director of the state office for the aging shall appoint a full-time state [~~long-term~~] long-term care ombudsman to administer and supervise the office of the state [~~long-term~~] long-term care ombudsman.

(b) The state ombudsman shall be selected from among individuals with expertise and experience in [~~the fields of long-term~~] long-term care and advocacy, long-term services and supports or other direct services for older persons or individuals with disabilities, consumer-oriented public policy advocacy, leadership and program management skills, negotiation and problem resolution skills, and with other qualifications determined by the director of the state office for the aging to be appropriate for the position.

(c) Any actual and potential conflicts of interest shall be identified and addressed in accordance with subdivision ten of this section.

(d) The state ombudsman [~~shall~~], personally or through authorized representatives [~~as provided for in paragraph (d) of this subdivision~~] shall:

(1) identify, investigate and resolve complaints that are made by, or on behalf of, [~~long-term~~] long-term care residents in this state and that relate to actions, inactions or decisions that may adversely affect the health, safety and welfare or rights of such residents; [~~provided, however, that~~] the state ombudsman [~~shall immediately~~] may refer to the appropriate investigatory agency information obtained during the investigation of a complaint which suggests the possible occurrence of physical abuse, mistreatment or neglect or Medicaid fraud, in accordance with [~~procedures established by the state ombudsman~~] the older Americans act of 1965, as amended and the regulations promulgated thereunder as well as rules and regulations promulgated by the state office for the aging; provided, however, that upon consent of the resident, the ombudsman or state ombudsman shall immediately make such referral. [~~Such procedures shall include, but not be limited to, the reporting to the appropriate investigatory agency any reasonable information which suggests the possible occurrence of physical abuse, mistreatment or neglect as defined in section twenty-eight hundred three-d of the public health law.~~] Nothing in this section shall be construed as authorizing the state ombudsman to impose a resolution unacceptable to either party

involved in a complaint or to assume powers delegated to the commissioner of health or the department of health pursuant to article twenty-eight of the public health law or to the commissioner of the office of children and family services or the office of children and family services pursuant to the social services law; nor does it authorize the state ombudsman to investigate final administrative determinations made pursuant to law by such commissioners if such decisions become the subject of complaints to the state ombudsman;

(2) provide services to assist residents in protecting their health, safety, welfare and rights, including but not limited to representing the interests of residents before governmental agencies and seeking appropriate administrative, legal and other remedies to protect their welfare, safety, health and rights;

(3) inform the residents about means of obtaining services provided by [~~public health, social services and veterans' affairs or~~] the long-term care ombudsman program and other public agencies;

(4) analyze, comment on, and monitor the development and implementation of federal, state and local laws, regulations [~~or~~], policies [~~with respect to the adequacy of long term care facilities and services in the state~~] and actions that pertain to the health, safety, welfare, and rights of the residents of long-term care facilities and services in the state;

(5) [~~in consultation with the director, establish procedures for the~~] ensure that residents have regular and timely access to the services provided through the long-term care ombudsman program and that residents and complainants receive timely responses to requests for information and complaints;

(6) recommend changes in federal, state and local laws, regulations, policies, and actions pertaining to the health, safety, welfare, and rights of residents;

(7) develop a certification training [~~of the authorized representatives and of local~~] program and continuing education for ombudsmen [~~and their staff~~] which at a minimum shall specify the minimum hours of training, the annual number of hours of in-service training, and the content of the training, including, but not limited to, training relating to federal, state, and local laws, regulations, and policies with respect to [~~long term~~] long-term care facilities in the state, investigative and resolution techniques, and such other training-related matters as the state ombudsman determines to be appropriate; [~~and~~

~~(6)~~] (8) provide administrative and technical assistance to long-term care ombudsmen and local ombudsman entities;

(9) make determinations and establish positions of the office of the state long-term care ombudsman, without necessarily representing the determinations or positions of the state office for the aging;

(10) recommend to the director of the state office for the aging policies and procedures for the state long-term care ombudsman program;

(11) coordinate with and promote the development of citizen organizations consistent with the interests of residents;

(12) promote, provide technical support for the development of, and provide ongoing support as requested by resident and family councils to protect the well-being and rights of residents;

(13) provide leadership to statewide systems advocacy efforts of the office of the state long-term care ombudsman on behalf of long-term care facility residents, including coordination of systems advocacy efforts carried out by representatives of the office of the state long-term care ombudsman;

(14) in accordance with applicable state contracting procedures, coordinate with the state office for the aging in the review and approval of plans or contracts governing local ombudsman entity operations;

(15) carry out such other activities as the director of the state office for the aging determines to be appropriate pursuant to the federal older Americans act of 1965 and other applicable federal and state laws and related regulations as may, from time to time, be amended; and

(16) in accordance with the regulations promulgated under this section provide the director of the state office for the aging with notice prior to performing the activities identified in paragraphs four, six and nine of this subdivision. Such notice shall not give the director of the state office for the aging or any other state official the right to pre-approve the position or communications of the state ombudsman.

[~~(d)(1)~~] (e) The state ombudsman, with the approval of the director of the state office for the aging, may appoint one or more [~~authorized representatives~~] assistant state long-term care ombudsmen to assist the state ombudsman in the performance of his or her duties under this section. Such assistant state ombudsmen must be verified as having completed a certification training program developed by the state ombudsman within six (6) months of their appointment as assistant state ombudsmen.

[~~(2)~~] (f)(1) The state ombudsman shall only appoint [~~only those~~] as ombudsmen individuals who have been [~~certified as having completed the training program developed pursuant to paragraph (c) of this subdivision~~] verified as completing the certification training program developed by the state ombudsman. In addition, the state long-term care ombudsman may refuse, suspend, or remove such appointments of ombudsmen.

(2) The state ombudsman shall develop a grievance process to offer an opportunity for reconsideration of any decision to refuse, suspend, or remove appointment of any ombudsman. Notwithstanding the grievance process, the state ombudsman shall make the final determination to designate or to refuse, suspend, or remove appointment of an ombudsman.

[~~(e) No state ombudsman, authorized representative, local ombudsman or immediate family member of such person shall:~~

~~(1) have a direct involvement in the licensing or certification of a long term care facility or of a provider of a long term care service;~~

~~(2) have an ownership or investment interest (represented by equity, debt, or other financial relationship) in a long term care facility or a long term care service;~~

~~(3) be employed by, or participate in the management of, a long term care facility; and~~

~~(4) receive remuneration (in cash or in kind) under a compensation arrangement with an owner or operator of a long term care facility.~~

~~(f) The state ombudsman shall establish written procedures to identify and remove conflicts of interest set out in paragraph (e) of this subdivision and shall include actions that the director may require an individual ombudsman or immediate family member to take to remove such conflicts of interest.~~]

(g) Any actual and potential conflicts of interest shall be identified and addressed in accordance with subdivision ten of this section.

(h) Within the amounts appropriated therefor, the state long-term care ombudsman program shall include services specifically designed to serve persons enrolled in managed [~~long term~~] long-term care plans or approved managed [~~long term~~] long-term care or operating demonstrations authorized under section forty-four hundred three-f of the public health law,

and shall also review and respond to complaints relating to marketing practices by such plans and demonstrations.

4. Local [~~long term~~] long-term care ombudsman program. (a) The state ombudsman, [~~with the approval of the director~~] in accordance with applicable state contracting procedures, may designate an entity to operate a local [~~long term~~] long-term care ombudsman program for one or more counties, and shall monitor the performance of such entity. If the state office for the aging is aware or becomes aware of any evidence that the designation of an entity to operate a long-term care ombudsman program by the state long-term care ombudsman would result in legal concerns or liability for the state office for the aging or office of the state long-term care ombudsman, the state ombudsman will comply with the state office for the aging's determination that such designation should not be made.

(b) The designated entity shall be an area agency on aging, a public agency or a private not-for-profit corporation which is [~~neither a provider or regulator of long term care facilities, or an affiliate or unit of such agency or corporation~~] free from any conflict of interest that cannot be remedied. Any actual and potential conflicts of interest shall be identified and addressed in accordance with subdivision ten of this section.

(c)(1) Each local [~~long term~~] long-term care ombudsman program shall be directed by a qualified individual who is employed and paid by the local entity and who shall have the duties and responsibilities as provided in regulations, consistent with the provisions of this section and of Title VII of the federal older Americans act of 1965, as amended. In addition, upon designation, the entity is responsible for providing for adequate and qualified staff, which may include trained volunteers to perform the functions of the local [~~long term~~] long-term care ombudsman program.

(2) No local program staff, including the supervisor and any volunteers, shall perform or carry out the activities on behalf of the [~~local long term~~] state long-term care ombudsman program unless such staff has [~~received the training pursuant to paragraph (c) of subdivision three of this section~~] been verified as completing the training program developed by the state ombudsman and has been approved by the state ombudsman as qualified to carry out the activities on behalf of the local program.

(d) [~~The director, in consultation with the state ombudsman, shall establish in regulations standards for the operation of a local long term care ombudsman program.~~

~~(e)~~] When the state ombudsman determines that a local [~~long term~~] long-term care ombudsman program does not meet the standards set forth in this section and in any related regulations, the state ombudsman [~~shall with the approval of the director withdraw~~], in coordination with the state office for the aging, may refuse, suspend, or remove the designation of the local [~~program~~] ombudsmen entity. Prior to taking such action, the state ombudsman shall send to the affected local program a notice of [~~intention~~] the state ombudsman's intentions to [~~withdraw~~] refuse, suspend, or remove the designation[~~, which notice shall also inform the local program of its right to an administrative hearing prior to the director's final determination. Such administrative hearing shall be conducted in accordance with procedures set forth in regulations~~]; provided, however, if the state office for the aging is aware or becomes aware of evidence that the designation or continued designation of an entity to operate a long-term care ombudsman program would result in legal concerns or liability for the state office for the

aging or the office of the state long-term care ombudsman, the state ombudsman will comply with the state office for the aging's determination that such designation should not be made or that such designation be refused, suspended, or removed.

(e) The state ombudsman shall develop a grievance process to offer an opportunity for reconsideration of any decision to refuse, suspend, or remove the designation of a local ombudsman entity. Notwithstanding the grievance process, the state ombudsman shall make the final determination to designate or to refuse, suspend, or remove the designation of a local ombudsman entity; provided, however, if the state office for the aging is aware or becomes aware of any evidence that the designation of an entity to operate a long-term care ombudsman program by the state long-term care ombudsman or that the failure of the state ombudsman to refuse, suspend, or remove the designation of a local ombudsman entity would result in legal concerns or liability for the state office for the aging or the office of the state long-term care ombudsman, the state ombudsman will comply with the state office for the aging's determination that such designation should not be made or that such designation be refused, suspended, or removed.

5. Review of complaint. [~~(a)~~] Upon receipt of a complaint, the ombudsman or state ombudsman shall determine [~~immediately~~] whether there are reasonable grounds for an investigation. Such investigation shall be conducted in a manner prescribed in regulations. The [~~state~~] ombudsman[~~, or the local ombudsman, whoever is appropriate, shall~~] or state ombudsman may immediately refer to the appropriate investigatory agency information obtained during the investigation of a complaint which suggests the possible occurrence of physical abuse, mistreatment or neglect or Medicaid fraud, in accordance with [~~procedures established by the state ombudsman. Such procedures shall include, but not be limited to, the reporting to the appropriate investigatory agency if there is reasonable cause to believe the occurrence of physical abuse, mistreatment or neglect as defined in section twenty-eight hundred three-d of the public health law.~~

~~(b) If the referral is made by the local ombudsman, a copy of the referral, together with copies of any relevant information or records, shall be sent forthwith to the state ombudsman~~] and subject to any limitations identified in the older Americans act of 1965, as amended and the regulations promulgated thereunder as well as rules and regulations promulgated by the state office for the aging; provided, however, that upon consent of the resident, the ombudsman or state ombudsman shall immediately make such referral.

6. [~~Retaliatory discrimination prohibited. (a) No person shall discriminate against any resident of a long term care facility because such resident or any person acting on behalf of the resident has brought or caused to be brought any complaint to the state or local long term care ombudsman for investigation, or against any resident or employee of a long term care facility or any other person because such resident or employee or any other person has given or provided or is to give or provide any statements, testimony, other evidence or cooperation for the purposes of any such complaint.~~

~~(b) Any resident who has reason to believe that he or she may have been discriminated against in violation of this subdivision may, within thirty days after such alleged violation occurs, file a complaint with the commissioner of health pursuant to subdivision ten of section twenty-eight hundred one-d of the public health law.~~

~~7.~~] Record access. (a) [~~(1) The state ombudsman, with the approval of the director, may approve and certify one or more previously designated local ombudsmen or state representatives as a records access ombudsman upon their having completed the training program for records access ombudsman set out in paragraph (b) of this subdivision; and~~

~~(2) A records access ombudsman shall be an employee of the office of the state ombudsman or of the local entity designated to carry out a local ombudsman program, except that the state ombudsman may certify as a records access ombudsman a volunteer under the direct supervision of the state ombudsman or of the supervisor of the local program, whichever is appropriate, if such volunteer is licensed in a medical, legal, or social work profession, or whose experience and training demonstrate equivalent competency in medical and personal records review.~~

~~(b) Except as otherwise provided by law, no person, including the state ombudsman, his or her authorized representatives, or any local ombudsman, shall be authorized to have access to or review the medical or personal records of a patient or resident pursuant to section twenty-eight hundred three-c of the public health law and section four hundred sixty-one-a of the social services law or pursuant to written consent to such access by the patient or resident, or his or her legal representative unless such person has been:~~

~~(1) Certified as having satisfactorily completed a training program prescribed by the office and designed, among other purposes, to (A) impress upon the participant the value, purpose, and confidentiality of medical and personal records, (B) familiarize the participant with the operational aspects of long term care facilities, and (C) deal with the medical and psycho-social needs of patients or residents in such facilities; and~~

~~(2) Certified as a records access ombudsman by the state ombudsman.~~

~~(c)~~] An ombudsman and state ombudsman shall have access to:

(1) medical, social and other records relating to a resident, if:

(A) the resident or resident representative communicates informed consent to the access and the consent is given in writing or through the use of auxiliary aids and services, provided that a guardian appointed pursuant to article seventeen-A of the surrogate's court procedure act or article eighty-one of the mental hygiene law who has the authority pursuant to court order to give such consent shall supersede any other resident representatives;

(B) the resident or resident representative communicates informed consent orally, visually, or through the use of auxiliary aids and services, and such consent is documented contemporaneously by an ombudsman in accordance with procedures established by the state ombudsman, provided that a guardian appointed pursuant to article seventeen-A of the surrogate's court procedure act or article eighty-one of the mental hygiene law who has the authority pursuant to court order to give such consent shall supersede any other resident representatives; and

(C) access is necessary in order to investigate a complaint, the resident representative refuses to consent to the access, an ombudsman has reasonable cause to believe that the resident representative is not acting in the best interests of the resident, and the ombudsman obtains the approval of the state ombudsman;

(2) administrative records, policies, and documents, to which the residents have or the general public has access, of long-term care facilities;

(3) all licensing and certification records maintained by the state with respect to long-term care facilities and copies thereof upon request; and

(4) a list of resident names and room numbers.

(b) No ombudsman or state ombudsman shall disclose [~~the identity of the resident or complainant that made a complaint to the ombudsman~~] files, records, or information about a complaint, including identifying information of any resident or complainant unless:

(1) the complainant or resident or his or her [~~legal~~] resident representative [~~gives written~~] communicates informed consent to the ombudsman[~~, except that written consent shall also include the resident or complainant giving oral consent that is documented contemporaneously in a writing made by the ombudsman with the agreement of the complainant or resident and in accordance with requirements established by the director; or~~] in writing, provided that a guardian appointed pursuant to article seventeen-A of the surrogate's court procedure act or article eighty-one of the mental hygiene law who has the authority pursuant to court order to give such consent shall supersede any other resident representatives.

(2) the complainant or resident or his or her resident representative communicates informed consent orally or visually, including through the use of auxiliary aids and services, and such consent is documented contemporaneously by an ombudsman or state ombudsman in accordance with the procedures of the office of the state long-term care ombudsman, provided that a guardian appointed pursuant to article seventeen-A of the surrogate's court procedure act or article eighty-one of the mental hygiene law who has the authority pursuant to court order to give such consent shall supersede any other resident representatives;

[~~(2)~~] (3) the disclosure is required pursuant to a court order; or

(4) the resident is unable to communicate informed consent and does not have a resident representative, or the state long-term care ombudsman determines that the resident representative has taken an action, inaction or made a decision that may adversely affect the health, safety, welfare, or rights of the resident. In such cases, disclosures may be made in accordance with criteria to be developed by the state ombudsman.

(c) all files, records, and other information of the long-term care ombudsman program, including information maintained by local ombudsman entities pertaining to the cases and activities of the program are the property of the office of the state long-term care ombudsman. Such files, records, and information may be disclosed only at the discretion of the state ombudsman or designee of the state ombudsman for such purpose and in accordance with the criteria developed by the state ombudsman.

(d) No ombudsman or state ombudsman shall disclose to any person outside of the long-term care ombudsman program any information obtained from a [~~patient's or~~] resident's [~~records~~] record without the approval of the state ombudsman or his or her designee, in accordance with procedures for disclosure established by [~~the director in consultation with~~] the state ombudsman. [~~Such approval is not required for suspected instances of physical abuse, mistreatment or neglect or Medicaid fraud and, subject to withholding identifying information of a non-consenting complainant or resident under paragraph (c) of this subdivision, a local ombudsman or state representative shall provide needed file information to the appropriate state and federal regulatory authorities and cooperate with them to help further their investigation.~~]

(e) No [~~records access or other~~] ombudsman **or state ombudsman** who directly or indirectly obtains access to a [~~patient's or~~] resident's medical or personal records pursuant to section twenty-eight hundred three-c of the public health law shall disclose to such [~~patient or~~] resident or to any other person outside of the **long-term care** ombudsman program the content of any such records to which such [~~patient,~~] resident or other person had not previously had the right of access, provided that this restriction shall not prevent such ombudsman from advising such [~~patient or~~] resident of the status or progress of an investigation or complaint process initiated at the request of such [~~patient or~~] resident or from referring such complaint, together with the relevant records, to appropriate investigatory agencies. Any person who intentionally violates the provisions of this subdivision shall be guilty of a misdemeanor. Nothing contained in this section shall be construed to limit or abridge any right of access to records, including financial records, otherwise available to ombudsmen, [~~patients or~~] residents, or any other person.

(f) Notwithstanding any law to the contrary, any individual, when acting in his or her official capacity as an ombudsman, shall be exempt from the mandatory reporting of abuse, neglect, exploitation, or maltreatment. However, an ombudsman may report abuse, neglect, exploitation, or maltreatment in accordance with the older Americans act of 1965, as amended and the regulations promulgated thereunder as well as rules and regulations promulgated by the state office for the aging; provided, however, that upon consent of the resident, the ombudsman or state ombudsman shall immediately make such referral.

(g) Nothing in this section shall prohibit the disclosure by an ombudsman, state ombudsman, or local ombudsman entity of non-identifying aggregate data for monitoring or reporting purposes to the state office for the aging or agency in which a local ombudsman entity is organizationally located.

(h) Any information accessed pursuant to this subdivision by a long-term care ombudsman or local ombudsman entity shall only be used for the purposes of the long-term care ombudsman program. Any use of such information other than for the purposes of the long-term care ombudsman program or purposes authorized under this section may constitute grounds for the designation of such ombudsman or local ombudsman entity to be removed.

7. Access to long-term care facilities. An ombudsman or state ombudsman shall have authority to enter all long-term care facilities at any time during a facility's regular business hours or regular visiting hours, and at any other time when access may be required by the circumstances to be investigated and shall have access to all residents and/or the resident representative to perform all functions and duties enumerated herein.

8. [~~Failure to cooperate. Any long term~~] **Noninterference. No long-term** care facility [~~which refuses~~] **shall:**

(a) refuse to permit [~~the state~~] **an** ombudsman[~~, his or her authorized representative, or any local ombudsman~~] **or state ombudsman** entry into such facility or [~~refuses~~]**, interfere with, or refuse** to cooperate with [~~the state~~] **an** ombudsman[~~, his or her authorized representative, or any local ombudsman in the~~] **or state ombudsman** carrying out [~~of~~] their mandated duties and responsibilities set forth in this section and any regulations promulgated pursuant thereto[~~, or refuses~~]**;**

(b) retaliate against an ombudsman or state ombudsman for carrying out his or her mandated duties and responsibilities set forth in this section and any regulations promulgated pursuant thereto;

(c) refuse to permit [~~patients~~] residents or staff to communicate freely and privately with [~~the state~~] an ombudsman[~~, his or her authorized representative, or any local ombudsman shall be subject to the appropriate sanction or penalties of the state agency that licenses the facility~~]; or

(d) retaliate or discriminate against any resident, resident representative, complainant, or staff member for filing a complaint with, providing information to, or otherwise cooperating with any ombudsman or state ombudsman. Any resident who has reason to believe that he or she may have been discriminated or retaliated against in violation of subdivision eight of this section may file a complaint with the commissioner of health pursuant to subdivision ten of section twenty-eight hundred one-d of the public health law.

9. Failure to cooperate. Any such facility that violates the provisions of subdivision eight of this section shall be subject to the appropriate sanctions pursuant to section twenty-eight hundred three-c of the public health law, and accompanying regulations, if such facility is a residential healthcare facility or section four hundred sixty-d of the social services law, and accompanying regulations, if such facility is an adult care facility.

10. Conflict of interest. The state office for the aging and the state ombudsman shall consider both the organizational and individual conflicts of interest that may impact the effectiveness and credibility of the work of the office of the state long-term care ombudsman. In so doing, both the state office for the aging and the state ombudsman shall be responsible to identify actual and potential conflicts and, where a conflict has been identified, to remove or remedy such conflict as set forth in paragraphs (b) and (d) of this subdivision.

(a) Identifying conflicts of interest. In identifying conflicts of interest, the state office for the aging and the state ombudsman shall consider the organizational conflicts that may impact the effectiveness and credibility of the work of the office of the state long-term care ombudsman. Organizational conflicts of interest include, but are not limited to, placement of the office of the state long-term care ombudsman, or requiring that a state ombudsman or long-term care ombudsman perform conflicting activities, in an organization that:

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

(2) is responsible for licensing, surveying, or certifying long-term care services;

(3) is an association (or an affiliate of such an association) of long-term care facilities, or of any other residential facilities for older individuals or individuals with disabilities;

(4) has any ownership or investment interest (represented by equity, debt, or other financial relationship) in, or receives grants or donations from, a long-term care facility;

(5) has governing board members with any ownership, investment, or employment interest in long-term care facilities;

(6) provides long-term care to residents of long-term care facilities, including the provision of personnel for long-term care facilities or the operation of programs which control access to or services for long-term care facilities;

(7) provides long-term care services, including programs carried out under a Medicaid waiver approved under section 1115 of the Social Security Act (42 U.S.C. 1315) or under subsection (b) or (c) of section 1915 of the Social Security Act (42 U.S.C. 1396n), subsection (i), (j), or (k) of section 1915 of the Social Security Act (42 U.S.C. 1396n);

(8) provides long-term care case management;

(9) provides long-term care coordination or case management for residents of long-term care facilities;

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

(11) sets reimbursement rates for long-term care services;

(12) provides adult protective services;

(13) is responsible for eligibility determinations regarding Medicaid or other public benefits for residents of long-term care facilities;

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

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

(16) provides guardianship, conservatorship, or other fiduciary or surrogate decision-making services for residents of long-term care facilities.

(b) Removing or remedying organizational conflicts. The state office for the aging and the state ombudsman shall identify and take steps to remove or remedy conflicts of interest between the office of the state long-term care ombudsman and the state office for the aging or other agency carrying out the state long-term care ombudsman program.

(1) The state ombudsman shall identify organizational conflicts of interest in the state long-term care ombudsman program and describe steps taken to remove or remedy conflicts within the annual report submitted to the assistant secretary through the national ombudsman reporting system.

(2) Where the office of the state long-term care ombudsman is located within or otherwise organizationally attached to the state office for the aging, the office for the aging shall:

(A) take reasonable steps to avoid internal conflicts of interest;

(B) establish a process for review and identification of internal conflicts;

(C) take steps to remove or remedy conflicts;

(D) ensure that no individual, or member of the immediate family of an individual, involved in the designating, appointing, otherwise selecting or terminating the state ombudsman is subject to a conflict of interest; and

(E) assure that the state ombudsman has disclosed such conflicts and described steps taken to remove or remedy conflicts within the annual report submitted to the assistant secretary through the national ombudsman reporting system.

(3) Where the state office for the aging is unable to adequately remove or remedy a conflict, it shall carry out the state long-term care ombudsman program by contract or other arrangement with a public agency or nonprofit private organization. The state office for the aging may not enter into a contract or other arrangement to carry out the state long-term care ombudsman program if the other entity, and may not operate the office of the state long-term care ombudsman directly if it:

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

(B) is an association (or an affiliate of such an association) of long-term care facilities, or of any other residential facilities for older individuals or individuals with disabilities; or

(C) has any ownership, operational, or investment interest (represented by equity, debt, or other financial relationship) in a long-term care facility.

(4) Where the state office for the aging carries out the state long-term care ombudsman program by contract or other arrangement with a public agency or nonprofit private organization, the state office for the aging shall:

(A) prior to contracting or making another arrangement, take reasonable steps to avoid conflicts of interest in such agency or organization which is to carry out the state long-term care ombudsman program and to avoid conflicts of interest in the state office for the aging oversight of the contract or arrangement;

(B) establish a process for periodic review and identification of conflicts;

(C) establish criteria for approval of steps taken by the agency or organization to remedy or remove conflicts;

(D) require that such agency or organization have a process in place to:

(i) take reasonable steps to avoid conflicts of interest, and

(ii) disclose identified conflicts and steps taken to remove or remedy conflicts to the state office for the aging for review and approval.

(5) Where an agency or organization carrying out the state long-term care ombudsman program by contract or other arrangement develops a conflict and is unable to adequately remove or remedy a conflict, the state office for the aging shall either operate the state long-term care ombudsman program directly or by contract or other arrangement with another public agency or nonprofit private organization. The state office for the aging shall not enter into such contract or other arrangement with an agency or organization which is responsible for licensing or certifying long-term care facilities in the state or is an association (or affiliate of such an association) of long-term care facilities.

(6) Where local ombudsman entities provide ombudsman services, the state ombudsman shall:

(A) prior to designating or renewing designation, take reasonable steps to avoid conflicts of interest in any agency which may host a local ombudsman entity,

(B) establish a process for periodic review and identification of conflicts of interest with the local ombudsman entity in any agencies hosting a local ombudsman entity,

(C) require that such agencies disclose identified conflicts of interest with the local ombudsman entity and steps taken to remove or remedy conflicts within such agency to the state ombudsman,

(D) establish criteria for approval of steps taken to remedy or remove conflicts in such agencies, and

(E) establish a process for review of and criteria for approval of plans to remove or remedy conflicts with the local ombudsman entity in such agencies.

(7) Failure of an agency hosting a local ombudsman entity to disclose a conflict to the office of the state long-term care ombudsman or inability to adequately remove or remedy a conflict shall constitute grounds for refusal, suspension, or removal of designation of the local ombudsman entity by the state ombudsman.

(c) Identifying individual conflicts of interest. (1) In identifying conflicts of interest, the state office for the aging and the state ombudsman shall consider individual conflicts that may impact the effectiveness and credibility of the work of the office of the state long-term care ombudsman or local long-term care ombudsman program.

(2) Individual conflicts of interest for the state ombudsman, long-term care ombudsmen, and members of their immediate family include, but are not limited to:

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

(B) ownership, operational, or investment interest (represented by equity, debt, or other financial relationship) in an existing or proposed long-term care facility or a long-term care service;

(C) employment of an individual by, or participation in the management of, a long-term care facility in the service area or by the owner or operator of any long-term care facility in the service area;

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

(E) accepting gifts or gratuities of significant value from a long-term care facility or its management, a resident or a resident representative of a long-term care facility in which the state ombudsman or long-term care ombudsman provide services (except where there is a personal relationship with a resident or resident representative which is separate from the individual's role as state ombudsman or long-term care ombudsman);

(F) accepting money or any other consideration from anyone other than the office of the state long-term care ombudsman, or an entity approved by the state ombudsman, for the performance of an act in the regular course of the duties of the state ombudsman or long-term care ombudsman without state ombudsman approval;

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

(H) serving residents of a facility in which an immediate family member resides.

(d) Removing or remedying individual conflicts. (1) The state office for the aging or state ombudsman shall develop and implement policies and procedures to ensure that no state ombudsman or long-term care ombudsman are required or permitted to hold positions or perform duties that would constitute a conflict of interest as set forth in paragraph (c) of this subdivision. This rule does not prohibit the state office for the aging or state ombudsman from having policies or procedures that exceed these requirements.

(2) When considering the employment, appointment, or designation of an individual as the state ombudsman or as a long-term care ombudsman, the state office for the aging or other employing or appointing entity shall:

(A) take reasonable steps to avoid employing, appointing, or designating an individual who has an unremedied conflict of interest or who has a member of the immediate family with an unremedied conflict of interest;

(B) take reasonable steps to avoid assigning an individual to perform duties which would constitute an unremedied conflict of interest;

(C) establish a process for periodic review and identification of conflicts of state ombudsman and long-term care ombudsmen; and

(D) take steps to remove or remedy conflicts.

(3) In no circumstance shall the entity which appoints, employs, or designates the state ombudsman appoint, employ, or designate an individual as the state ombudsman who:

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

(B) has an ownership or investment interest (represented by equity, debt, or other financial relationship) in a long-term care facility. Divestment within a reasonable period may be considered an adequate remedy to this conflict;

(C) has been employed by or participating in the management of a long-term care facility within the previous twelve months; or

(D) receives, or has the right to receive, directly or indirectly, remuneration (in cash or in kind) under a compensation arrangement with an owner or operator of a long-term care facility.

(4) In no circumstance shall the state office for the aging or an agency hosting a local ombudsman entity appoint, employ, or designate an individual, nor shall the state ombudsman designate an individual, as a long-term care ombudsman who:

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

(B) has an ownership or investment interest (represented by equity, debt, or other financial relationship) in a long-term care facility. Divestment within a reasonable period may be considered an adequate remedy to this conflict;

(C) receives, directly or indirectly, remuneration (in cash or in kind) under a compensation arrangement with an owner or operator of a long-term care facility; or

(D) is employed by, or participating in the management of, a long-term care facility.

(i) An agency which appoints or employs long-term care ombudsmen shall make efforts to avoid appointing, employing, or designating an individual as a long-term care ombudsman who has been employed by or participating in the management of a long-term care facility within the previous twelve months.

(ii) Where such individual is appointed, employed, or designated, the agency shall take steps to remedy the conflict.

11. Civil immunity. Notwithstanding any other provision of law, ombudsmen designated under this section [~~or who are also records access ombudsmen functioning in accordance with this section~~] shall be included within the definition of employee as set forth in section seventeen of the public officers law and shall be defended and indemnified in accordance with the provisions of article two of such law.

[~~10.~~] 12. Grievance process. In addition to the provisions listed in this section, the state ombudsman shall recommend policies and procedures for the receipt and review of grievances regarding determinations or actions of the state ombudsman or ombudsmen to the director of the state office for the aging.

13. Regulations. The director of the state office for the aging, in consultation with the state ombudsman, is authorized to promulgate regulations to implement the provisions of this section.

[~~11.~~] 14. Annual report. On or before March thirty-first, two thousand five, and annually thereafter, the state ombudsman shall submit to the governor, commissioner of the federal administration on aging, speaker

of the assembly, temporary president of the senate, director of the state office for the aging, commissioner of the department of health, and the commissioner of children and family services a report and make such report available to the public:

(a) describing the activities carried out by the office of the state [~~long term~~] long-term care ombudsman during the prior calendar year;

(b) containing and analyzing data relating to complaints and conditions in [~~long term~~] long-term care facilities and to residents for the purpose of identifying and resolving significant problems;

(c) evaluating the problems experienced by, and the complaints made by or on behalf of, residents;

(d) containing recommendations for[~~:~~

~~(1)~~] appropriate state legislation, rules and regulations and other action to improve the quality of the care and life of the residents[~~; and~~

~~(2)~~]~~,~~ protecting the health, safety and welfare and rights of the residents **and resolving resident complaints and identified problems or barriers**;

(e) **containing an analysis of the success of the long-term care ombudsman program, including success in providing services to residents;**

(f) describing barriers that prevent the optimal operation of the ombudsman program;

(g) describing any organizational conflicts of interest in the ombudsman program that have been identified and the steps taken to remove or remedy such conflicts; and

(h) any other matters as the state ombudsman, in consultation with the director **of the state office for the aging**, determines to be appropriate.

§ 2. Paragraph (b) of subdivision 1 of section 218 of the elder law, as amended by section 2 of chapter 462 of the laws of 2015, is amended to read as follows:

[~~(b) "Long term~~] **(d) "Long-term** care facilities" shall mean residential health care facilities as defined in subdivision three of section twenty-eight hundred one of the public health law, adult care facilities as defined in subdivision twenty-one of section two of the social services law, and assisted living residences, as defined in article forty-six-B of the public health law, or any facilities which hold themselves out or advertise themselves as providing assisted living services and which are required to be licensed or certified under the social services law or the public health law.

§ 3. This act shall take effect immediately; provided, however that:

(a) the amendments to paragraph (b) of subdivision 1 of section 218 of the elder law made by section two of this act shall take effect on the same date and in the same manner as section 2 of chapter 462 of the laws of 2015, takes effect; and

(b) the amendments to paragraph (g) of subdivision 3 of section 218 of the elder law made by section one of this act shall not affect the repeal of such paragraph as provided in section 5 of chapter 462 of the laws of 2015, as amended, and shall be deemed repealed therewith.