

1 **LONG-TERM CARE OMBUDSMAN AMENDMENTS**

2 2017 GENERAL SESSION

3 STATE OF UTAH

4 **Chief Sponsor: Brad M. Daw**

5 Senate Sponsor: Margaret Dayton

7 **LONG TITLE**

8 **General Description:**

9 This bill amends provisions related to the long-term care ombudsman program within
10 the Division of Aging and Adult Services, within the Department of Human Services.

11 **Highlighted Provisions:**

12 This bill:

- 13 ▶ amends definitions;
- 14 ▶ eliminates references to "elderly" in provisions governing the long-term care
15 ombudsman program;
- 16 ▶ requires the use of "substitute judgment" by the ombudsman in certain cases;
- 17 ▶ makes other amendments related to the long-term care ombudsman program; and
- 18 ▶ makes technical changes.

19 **Money Appropriated in this Bill:**

20 None

21 **Other Special Clauses:**

22 None

23 **Utah Code Sections Affected:**

24 AMENDS:

25 **62A-3-201**, as enacted by Laws of Utah 1988, Chapter 1

26 **62A-3-202**, as last amended by Laws of Utah 1998, Chapter 192

27 **62A-3-203**, as last amended by Laws of Utah 2006, Chapter 31



- 28 [62A-3-204](#), as last amended by Laws of Utah 2009, Chapter 75
- 29 [62A-3-205](#), as last amended by Laws of Utah 2008, Chapter 382
- 30 [62A-3-206](#), as last amended by Laws of Utah 2010, Chapter 324
- 31 [62A-3-207](#), as last amended by Laws of Utah 1993, Chapter 176
- 32 [62A-3-208](#), as enacted by Laws of Utah 1988, Chapter 1

33

34 *Be it enacted by the Legislature of the state of Utah:*

35 Section 1. Section [62A-3-201](#) is amended to read:

36 **[62A-3-201. Legislative findings -- Purpose -- Ombudsman.](#)**

37 The Legislature finds and declares that the [aging] citizens of this state should be
38 assisted in asserting their civil and human rights as patients, residents, and clients of long-term
39 care facilities created to serve their specialized needs and problems; and that for the health,
40 safety, and welfare of these citizens, the state should take appropriate action through an
41 adequate legal framework to address their difficulties.

42 The purpose of this part is to establish within the division the long-term care
43 ombudsman program for the [aging] citizens of this state and identify duties and
44 responsibilities of that program and of the ombudsman, in order to address problems relating to
45 long-term care for aging citizens, and to fulfill federal requirements.

46 Section 2. Section [62A-3-202](#) is amended to read:

47 **[62A-3-202. Definitions.](#)**

48 As used in this part:

49 [~~(1) "Elderly resident" means an adult 60 years of age or older who because of~~
50 ~~physical, economic, social, or emotional problems cannot function normally on an independent~~
51 ~~basis, and who resides in a long-term care facility.]~~

52 (1) "Assisted living facility" has the same meaning as provided in Section [26-21-2](#).

53 (2) "Auxiliary aids and services" means items, equipment, or services that assist in
54 effective communication between an individual who has a mental, hearing, vision, or speech
55 disability, and another individual.

56 [~~(2)~~] (3) "Government agency" means any department, division, office, bureau, board,
57 commission, authority, or any other agency or instrumentality created by the state, or to which
58 the state is a party, or created by any county or municipality, which is responsible for the

59 regulation, visitation, inspection, or supervision of facilities, or which provides services to
60 patients, residents, or clients of facilities.

61 (4) "Intermediate care facility" means a facility that provides, on a regular basis, health
62 care and services to an individual who does not require the degree of care and treatment that a
63 hospital or skilled nursing facility provides but who does require health care and services in
64 addition to room and board.

65 [~~(3)~~] (5) "Long-term care facility" means [any] a skilled nursing facility, intermediate
66 care facility, nursing home, small health care facility, Type N facility, or assisted living
67 facility[; adult foster care home, or any living arrangement in the community through which
68 room and personal care services are provided for elderly residents].

69 [~~(4)~~] (6) "Ombudsman" means the administrator of the long-term care ombudsman
70 program, created pursuant to Section [62A-3-203](#).

71 (7) "Resident" means an individual who resides in a long-term care facility.

72 (8) "Skilled nursing facility" means an institution primarily providing:

73 (a) inpatient skilled nursing care and related services on a continuing basis for an
74 individual who requires mental, medical, or nursing care; or

75 (b) rehabilitation services for an injured individual, a sick individual, or an individual
76 with a disability.

77 (9) "Small health care facility" means the same as that term is defined in Section
78 [26-21-2](#).

79 (10) "Substituted judgment" means judgment by a surrogate decision maker to attempt
80 to determine, with as much accuracy as possible, the decision an incompetent patient would
81 make if the patient were competent to make the decision.

82 (11) "Type N facility" means a residence in which a licensed nurse resides and
83 provides protected living arrangements, nursing care, and other services on a daily basis for
84 two to three individuals who are also residing in the residence and are unrelated to the licensee.

85 Section 3. Section **62A-3-203** is amended to read:

86 **62A-3-203. Long-Term Care Ombudsman Program -- Responsibilities.**

87 (1) (a) There is created within the division the Long-Term Care Ombudsman Program
88 for the purpose of promoting, advocating, and ensuring the adequacy of care received, and the
89 quality of life experienced by [~~elderly~~] residents of long-term care facilities within the state.

90 (b) Subject to [the] rules made under Section 62A-3-106.5, the ombudsman is
91 responsible for:

92 (i) receiving and resolving complaints relating to [elderly] residents of long-term care
93 facilities;

94 (ii) conducting investigations of any act, practice, policy, or procedure of [any] a
95 long-term care facility or government agency [which it] that the ombudsman has reason to
96 believe affects or may affect the health, safety, welfare, or civil and human rights of [any
97 elderly] a resident of a long-term care facility;

98 (iii) coordinating the department's services for [elderly] residents of long-term care
99 facilities to ensure that those services are made available to eligible [elderly] citizens of the
100 state; and

101 (iv) providing training regarding the delivery and regulation of long-term care to public
102 agencies, local ombudsman program volunteers, and operators and employees of long-term
103 care facilities.

104 (2) (a) A long-term care facility shall display an ombudsman program information
105 poster.

106 (b) The division is responsible for providing the posters, which shall include the names
107 and phone numbers for local ombudsman programs.

108 Section 4. Section 62A-3-204 is amended to read:

109 **62A-3-204. Powers and responsibilities of ombudsman.**

110 The long-term care ombudsman shall:

111 (1) comply with Title VII of the federal Older Americans Act, 42 U.S.C. 3058 et seq.;

112 (2) establish procedures for and engage in receiving complaints, conducting
113 investigations, reporting findings, issuing findings and recommendations, promoting
114 community contact and involvement with [elderly] residents of long-term care facilities
115 through the use of volunteers, and publicizing its functions and activities;

116 (3) investigate an administrative act or omission of [any] a long-term care facility or
117 governmental agency if the act or omission relates to the purposes of the ombudsman. The
118 ombudsman may exercise its authority under this subsection without regard to the finality of
119 the administrative act or omission, and it may make findings in order to resolve the subject
120 matter of its investigation;

121 (4) recommend to the division rules that it considers necessary to carry out the
122 purposes of the ombudsman;

123 (5) cooperate and coordinate with governmental entities and voluntary assistance
124 organizations in exercising its powers and responsibilities;

125 (6) request and receive cooperation, assistance, services, and data from any
126 governmental agency, to enable it to properly exercise its powers and responsibilities;

127 (7) establish local ombudsman programs to assist in carrying out the purposes of this
128 part, which shall meet the standards developed by the division, and possess all of the authority
129 and power granted to the long-term care ombudsman program under this part; and

130 (8) exercise other powers and responsibilities as reasonably required to carry out the
131 purposes of this part.

132 Section 5. Section **62A-3-205** is amended to read:

133 **62A-3-205. Procedures -- Adjudicative proceedings.**

134 The long-term care ombudsman shall comply with the procedures and requirements of
135 Title 63G, Chapter 4, Administrative Procedures Act, in [its] the long-term care ombudsman's
136 adjudicative proceedings.

137 Section 6. Section **62A-3-206** is amended to read:

138 **62A-3-206. Investigation of complaints -- Procedures.**

139 (1) (a) The ombudsman shall investigate each complaint [~~he~~] the ombudsman receives.
140 An investigation may consist of a referral to another public agency, the collecting of facts and
141 information over the telephone, or an inspection of the long-term care facility that is named in
142 the complaint.

143 (b) The ombudsman shall notify any complainant of [~~its~~] the ombudsman's decision to
144 not pursue investigation of a complaint after the initial investigation and the reasons for the
145 decision.

146 (2) In making [~~any~~] an investigation, the ombudsman may engage in actions [~~it deems~~]
147 the ombudsman considers appropriate, including[, ~~but not limited to~~]:

148 (a) making inquiries and obtaining information;

149 (b) holding investigatory hearings;

150 (c) entering [~~upon~~] and inspecting any premises, without notice to the facility, provided
151 the investigator [~~identifies himself~~] presents, upon entering the premises [~~as a person~~],

152 identification as an individual authorized by this part to inspect the premises; and

153 (d) inspecting or obtaining [~~any~~] a book, file, medical record, or other record required
154 by law to be retained by the long-term care facility or governmental agency, pertaining to
155 [~~elderly~~] residents, subject to Subsection (3).

156 (3) (a) Before reviewing a resident's records, the ombudsman shall seek to obtain
157 [~~written~~] from the institutionalized resident, or the institutionalized resident's legal
158 representative, permission in writing, orally, or through the use of auxiliary aids and services to
159 review the records [from the institutionalized elderly person or his legal representative].

160 (b) The effort to obtain permission under Subsection (3)(a) shall include personal
161 contact with the [~~elderly~~] resident or [~~his~~] the resident's legal representative. If the resident or
162 the resident's legal representative refuses to [~~sign a release allowing access to records~~] give
163 permission, the ombudsman shall record and abide by this decision.

164 (c) If the ombudsman's attempt to obtain [~~a signed release~~] permission fails for [~~any~~
165 ~~other~~] a reason other than the refusal of the resident or the resident's legal representative to give
166 permission, the ombudsman may review the records.

167 [~~(4) Following any investigation, the ombudsman shall report its findings and~~
168 ~~recommendations to the complainant, elderly residents of long-term care facilities affected by~~
169 ~~the complaint, and to the long-term care facility or governmental agency involved.]~~

170 (d) If the ombudsman has reasonable cause to believe that the resident is incompetent
171 to give permission and that the resident's legal representative is not acting in the best interest of
172 the resident, the ombudsman shall use the substituted judgment of the ombudsman to
173 determine whether review of the resident's records is in the best interest of the resident. If the
174 ombudsman determines that review of the resident's records is in the best interest of the
175 resident, the ombudsman shall review the records.

176 Section 7. Section **62A-3-207** is amended to read:

177 **62A-3-207. Confidentiality of materials relating to complaints or investigations --**
178 **Immunity from liability -- Discriminatory, disciplinary, or retaliatory actions prohibited.**

179 (1) The ombudsman shall establish procedures to [~~assure~~] ensure that all files
180 maintained by the long-term care ombudsman program are disclosed only at the discretion of
181 and under the authority of the ombudsman. The identity of a complainant or [~~elderly~~] resident
182 of a long-term care facility may not be disclosed by the ombudsman unless:

183 (a) the complainant or [~~elderly~~] resident, or the legal representative of either, consents
 184 in writing, orally, or through the use of auxiliary aids and services to the disclosure;

185 (b) disclosure is ordered by the court; or

186 (c) the disclosure is approved by the ombudsman and is made, as part of an
 187 investigation involving the resident, to a local area agency on aging, the state adult protective
 188 services agency, the Department of Health, the Department of Public Safety, [~~the~~] a local law
 189 enforcement agency, or [~~the~~] a county attorney [~~as part of the investigation of a complaint~~].

190 (2) Neither the ombudsman nor [~~its agents or designees~~] the ombudsman's agent or
 191 designee may be required to testify in court with respect to confidential matters, except as the
 192 court finds necessary to enforce [~~the provisions of~~] this part.

193 (3) Any person who makes a complaint to the ombudsman pursuant to this part is
 194 immune from any civil or criminal liability unless the complaint was made maliciously or
 195 without good faith.

196 (4) (a) Discriminatory, disciplinary, or retaliatory action may not be taken against
 197 [~~any~~] a volunteer or employee of a long-term care facility or governmental agency, or against
 198 [~~any elderly~~] a resident of a long-term care facility, for any communication made or
 199 information given or disclosed to aid the ombudsman or other appropriate public agency in
 200 carrying out its duties and responsibilities, unless the same was done maliciously or without
 201 good faith.

202 (b) This subsection does not infringe on the rights of an employer to supervise,
 203 discipline, or terminate an employee for any other reason.

204 Section 8. Section **62A-3-208** is amended to read:

205 **62A-3-208. Prohibited acts -- Penalty.**

206 (1) No person may:

207 (a) give or cause to be given advance notice to a long-term care facility or agency that
 208 an investigation or inspection under the direction of the ombudsman is pending or under
 209 consideration, except as provided by law;

210 (b) disclose confidential information submitted to the ombudsman pursuant to this part,
 211 except as provided by law;

212 (c) willfully interfere with the lawful actions of the ombudsman;

213 (d) willfully refuse to comply with lawful demands of the ombudsman, including the

214 demand for immediate entry into or inspection of the premises of any long-term care facility or
215 agency or for immediate access to [~~any elderly~~] a resident of a long-term care facility; or

216 (e) offer or accept any compensation, gratuity, or promise thereof in an effort to affect
217 the outcome of a matter being investigated or of a matter [~~which~~] that is before the ombudsman
218 for determination of whether an investigation should be conducted.

219 (2) Violation of any provision of this part constitutes a class B misdemeanor.

Legislative Review Note
Office of Legislative Research and General Counsel