



To: Chairman Hawkins, and Members, Health and Human Services Committee

From: Rachel Monger, Vice President of Government Affairs

Date: February 6, 2018

Testimony in Opposition to HB 2590

Thank you, Chairman and Members of the Committee. I am Rachel Monger, Vice President of Government Affairs for LeadingAge Kansas, the state association for faith-based and not-for-profit aging services.

We are here today in opposition to House Bill 2590, concerning the scope of power and authority granted to the Office of the State Long Term Care Ombudsman. Although we have had no opportunity to discuss this bill with the Kansas Department for Aging and Disability Services, it seems clear that the intent behind the bill is to adjust state law to reflect changes made last year to the Federal regulations governing long term care ombudsmen. However, there are two sections of the bill that expand the scope of authority of the ombudsman office far beyond anything contemplated in federal regulation.

New Language for Investigation of The Appointment and Activities of Resident Representatives

HB 2590 gives the Long Term Care Ombudsman independent authority to investigate and challenge both the appointment and activities of a resident's guardian, conservator or power of attorney. An authority now reserved for law enforcement and the Office of the Attorney General. Even then, those investigations must be for civil or criminal violations. The wording of HB 2590 is general to *any* activities of a representative, which would include perfectly legal actions and decisions.

The new federal ombudsman regulations contain the same wording as that inserted into HB 2590 on Page 6, Lines 39-43 and Page 7, Lines 1-7. However, there is an important distinction between the structure of the wording in HB 2590 and the wording in federal regulation 45 CFR 1327.13

Federal regulation allows the ombudsman and her representatives to investigate complaints that relate to the appointment or activities of a resident representative, however their power to investigate and pursue those type of complaints are specifically limited to their work with or within long term care facilities, state agencies or health and social service agencies.

The wording of HB 2590 takes the wording regarding investigation and pursuit of complaints about resident representatives, and puts it outside the previous paragraph that establishes a limitation of their other types of investigatory work with facilities and state agencies. We strongly object to this expansion of the investigation power of the long term care ombudsman. Although we have not had the opportunity to consult, we suspect that law enforcement, district attorneys and the Attorney General would also strongly object to this expansion of ombudsman authority.

We request that paragraph (2) granting the independent authority be deleted entirely, or deleted and the wording incorporated into paragraph (1) directly preceding it in order to better reflect federal language and intent.

Broad Access to All Facility Records by Volunteer Ombudsmen

New federal regulatory changes found in CFR 1327.11(e)(2) grant the authority to ombudsman volunteers to access medical, social and other records *relating to a specific resident*. The section also allows the ombudsman volunteer to access records, policies and documents that would be available to a resident or the general public.

HB 2590 goes far beyond the federal regulation, and grants a volunteer ombudsman nearly unlimited power to access records unrelated to a specific resident, and consisting of confidential internal records and documents of the facility. The volunteer need only decide that those documents or records are relevant and necessary to their assistance of a resident.

This is a completely unacceptable power to grant a volunteer ombudsman. We will remind the committee that a volunteer ombudsman can be anyone in the community, of any background or ability, who undergoes a week-long training program. In what other industry could a citizen volunteer walk into an organization, and demand any kind of internal and/or confidential and/or privileged documents related to the business itself or the people it serves, because the volunteer believes it to be relevant to their assistance to a customer.

We are uncomfortable enough with such broad authority being granted to a state-employed ombudsman. Granting that kind of power and authority to a program volunteer goes beyond anything ever granted in state and federal law, in any industry.

We respectfully ask the committee to delete the wording “*or volunteer ombudsman*” found in HB 2590 on page 9, Lines 2 and 3.

We thank the committee for their time and attention to this issue, and are always available for further discussion

in §§ 1327.13 and 1327.19 are to constitute the entirety of the Ombudsman's work. The State agency or other agency carrying out the Office shall not require or request the Ombudsman to be responsible for leading, managing or performing the work of non-ombudsman services or programs except on a time-limited, intermittent basis.

(1) This provision does not limit the authority of the Ombudsman program to provide ombudsman services to populations other than residents of long-term care facilities so long as the appropriations under the Act are utilized to serve residents of long-term care facilities, as authorized by the Act.

(2) [Reserved]

(d) The State agency, and other entity selecting the Ombudsman, if applicable, shall ensure that the Ombudsman meets minimum qualifications which shall include, but not be limited to, demonstrated expertise in:

(1) Long-term services and supports or other direct services for older persons or individuals with disabilities;

(2) Consumer-oriented public policy advocacy;

(3) Leadership and program management skills; and

(4) Negotiation and problem resolution skills.

(e) *Policies and procedures.* Where the Ombudsman has the legal authority to do so, he or she shall establish policies and procedures, in consultation with the State agency, to carry out the Ombudsman program in accordance with the Act. Where State law does not provide the Ombudsman with legal authority to establish policies and procedures, the Ombudsman shall recommend policies and procedures to the State agency or other agency in which the Office is organizationally located, and such agency shall establish Ombudsman program policies and procedures. Where local Ombudsman entities are designated within area agencies on aging or other entities, the Ombudsman and/or appropriate agency shall develop such policies and procedures in consultation with the agencies hosting local Ombudsman entities and with representatives of the Office. The policies and procedures must address the matters within this subsection.

(1) *Program administration.* Policies and procedures regarding program administration must include, but not be limited to:

(i) A requirement that the agency in which the Office is organizationally located must not have personnel policies or practices which prohibit the Ombudsman from performing the

functions and responsibilities of the Ombudsman, as set forth in § 1327.13, or from adhering to the requirements of section 712 of the Act. Nothing in this provision shall prohibit such agency from requiring that the Ombudsman, or other employees or volunteers of the Office, adhere to the personnel policies and procedures of the entity which are otherwise lawful.

(ii) A requirement that an agency hosting a local Ombudsman entity must not have personnel policies or practices which prohibit a representative of the Office from performing the duties of the Ombudsman program or from adhering to the requirements of section 712 of the Act. Nothing in this provision shall prohibit such agency from requiring that representatives of the Office adhere to the personnel policies and procedures of the host agency which are otherwise lawful.

(iii) A requirement that the Ombudsman shall monitor the performance of local Ombudsman entities which the Ombudsman has designated to carry out the duties of the Office.

(iv) A description of the process by which the agencies hosting local Ombudsman entities will coordinate with the Ombudsman in the employment or appointment of representatives of the Office.

(v) Standards to assure prompt response to complaints by the Office and/or local Ombudsman entities which prioritize abuse, neglect, exploitation and time-sensitive complaints and which consider the severity of the risk to the resident, the imminence of the threat of harm to the resident, and the opportunity for mitigating harm to the resident through provision of Ombudsman program services.

(vi) Procedures that clarify appropriate fiscal responsibilities of the local Ombudsman entity, including but not limited to clarifications regarding access to programmatic fiscal information by appropriate representatives of the Office.

(2) *Procedures for access.* Policies and procedures regarding timely access to facilities, residents, and appropriate records (regardless of format and including, upon request, copies of such records) by the Ombudsman and representatives of the Office must include, but not be limited to:

(i) Access 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;

(ii) Access to all residents to perform the functions and duties set forth in §§ 1327.13 and 1327.19;

(iii) Access to the name and contact information of the resident representative, if any, where needed to perform the functions and duties set forth in §§ 1327.13 and 1327.19;

(iv) Access to review the 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;

(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 a representative of the Office in accordance with such procedures; and

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

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

(vi) Access of the Ombudsman to, and, upon request, copies of all licensing and certification records maintained by the State with respect to long-term care facilities; and

(vii) Reaffirmation that the Health Insurance Portability and Accountability Act of 1996 (HIPAA) Privacy Rule, 45 CFR part 160 and 45 CFR part 164, subparts A and E, does not preclude release by covered entities of resident private health information or other resident identifying information to the Ombudsman program, including but not limited to residents' medical, social, or other records, a list of resident names and room numbers, or information collected in the course of a State or Federal survey or inspection process.

(3) *Disclosure.* Policies and procedures regarding disclosure of files, records and other information maintained by the Ombudsman program must include, but not be limited to:

(i) Provision that the files, records, and information maintained by the Ombudsman program may be disclosed only at the discretion of the Ombudsman or designee of the Ombudsman for such purpose and in accordance with the criteria developed

by the Ombudsman, as required by § 1327.13(e);

(ii) Prohibition of the disclosure of identifying information of any resident with respect to whom the Ombudsman program maintains files, records, or information, except as otherwise provided by § 1327.19(b)(5) through (8), unless:

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

(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 a representative of the Office in accordance with such procedures; or

(C) The disclosure is required by court order;

(iii) Prohibition of the disclosure of identifying information of any complainant with respect to whom the Ombudsman program maintains files, records, or information, unless:

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

(B) The complainant communicates informed consent orally, visually, or through the use of auxiliary aids and services and such consent is documented contemporaneously by a representative of the Office in accordance with such procedures; or

(C) The disclosure is required by court order;

(iv) Exclusion of the Ombudsman and representatives of the Office from abuse reporting requirements, including when such reporting would disclose identifying information of a complainant or resident without appropriate consent or court order, except as otherwise provided in § 1327.19(b)(5) through (8); and

(v) Adherence to the provisions of paragraph (e)(3) of this section, regardless of the source of the request for information or the source of funding for the services of the Ombudsman program, notwithstanding section 705(a)(6)(c) of the Act.

(4) *Conflicts of interest.* Policies and procedures regarding conflicts of interest must establish mechanisms to identify and remove or remedy conflicts of interest as provided in § 1327.21, including:

(i) Ensuring that no individual, or member of the immediate family of an individual, involved in the employment

or appointment of the Ombudsman is subject to a conflict of interest;

(ii) Requiring that other agencies in which the Office or local Ombudsman entities are organizationally located have policies in place to prohibit the employment or appointment of an Ombudsman or representatives of the Office with a conflict that cannot be adequately removed or remedied;

(iii) Requiring that the Ombudsman take reasonable steps to refuse, suspend or remove designation of an individual who has a conflict of interest, or who has a member of the immediate family with a conflict of interest, which cannot be adequately removed or remedied;

(iv) Establishing the methods by which the Office and/or State agency will periodically review and identify conflicts of the Ombudsman and representatives of the Office; and

(v) Establishing the actions the Office and/or State agency will require the Ombudsman or representatives of the Office to take in order to remedy or remove such conflicts.

(5) *Systems advocacy.* Policies and procedures related to systems advocacy must assure that the Office is required and has sufficient authority to carry out its responsibility to analyze, comment on, and monitor the development and implementation of Federal, State, and local laws, regulations, and other government policies and actions that pertain to long-term care facilities and services and to the health, safety, welfare, and rights of residents, and to recommend any changes in such laws, regulations, and policies as the Office determines to be appropriate.

(i) Such procedures must exclude the Ombudsman and representatives of the Office from any State lobbying prohibitions to the extent that such requirements are inconsistent with section 712 of the Act.

(ii) Nothing in this part shall prohibit the Ombudsman or the State agency or other agency in which the Office is organizationally located from establishing policies which promote consultation regarding the determinations of the Office related to recommended changes in laws, regulations, and policies. However, such a policy shall not require a right to review or pre-approve positions or communications of the Office.

(6) *Designation.* Policies and procedures related to designation must establish the criteria and process by which the Ombudsman shall designate and refuse, suspend or remove designation of local Ombudsman entities and representatives of the Office.

(i) Such criteria should include, but not be limited to, the authority to refuse, suspend or remove designation a local Ombudsman entity or representative of the Office in situations in which an identified conflict of interest cannot be adequately removed or remedied as set forth in § 1327.21.

(ii) [Reserved]

(7) *Grievance process.* Policies and procedures related to grievances must establish a grievance process for the receipt and review of grievances regarding the determinations or actions of the Ombudsman and representatives of the Office.

(i) Such process shall include an opportunity for reconsideration of the Ombudsman decision to refuse, suspend, or remove designation of a local Ombudsman entity or representative of the Office.

Notwithstanding the grievance process, the Ombudsman shall make the final determination to designate or to refuse, suspend, or remove designation of a local Ombudsman entity or representative of the Office.

(ii) [Reserved]

(8) *Determinations of the Office.*

Policies and procedures related to the determinations of the Office must ensure that the Ombudsman, as head of the Office, shall be able to independently make determinations and establish positions of the Office, without necessarily representing the determinations or positions of the State agency or other agency in which the Office is organizationally located, regarding:

(i) Disclosure of information maintained by the Ombudsman program within the limitations set forth in section 712(d) of the Act;

(ii) Recommendations to changes in Federal, State and local laws, regulations, policies and actions pertaining to the health, safety, welfare, and rights of residents; and

(iii) Provision of information to public and private agencies, legislators, the media, and other persons, regarding the problems and concerns of residents and recommendations related to the problems and concerns.

§ 1327.13 Functions and responsibilities of the State Long-Term Care Ombudsman.

The Ombudsman, as head of the Office, shall have responsibility for the leadership and management of the Office in coordination with the State agency, and, where applicable, any other agency carrying out the Ombudsman program, as follows.

(a) *Functions.* The Ombudsman shall, personally or through representatives of the Office—

- (1) Identify, investigate, and resolve complaints that—
 - (i) Are made by, or on behalf of, residents; and
 - (ii) Relate to action, inaction, or decisions, that may adversely affect the health, safety, welfare, or rights of residents (including the welfare and rights of residents with respect to the appointment and activities of resident representatives) of—
 - (A) Providers, or representatives of providers, of long-term care;
 - (B) Public agencies; or
 - (C) Health and social service agencies.
 - (2) Provide services to protect the health, safety, welfare, and rights of the residents;
 - (3) Inform residents about means of obtaining services provided by the Ombudsman program;
 - (4) Ensure that residents have regular and timely access to the services provided through the Ombudsman program and that residents and complainants receive timely responses from representatives of the Office to requests for information and complaints;
 - (5) Represent the interests of residents before governmental agencies, assure that individual residents have access to, and pursue (as the Ombudsman determines as necessary and consistent with resident interests) administrative, legal, and other remedies to protect the health, safety, welfare, and rights of residents;
 - (6) Provide administrative and technical assistance to representatives of the Office and agencies hosting local Ombudsman entities;
 - (7)(i) Analyze, comment on, and monitor the development and implementation of Federal, State, and local laws, regulations, and other governmental policies and actions, that pertain to the health, safety, welfare, and rights of the residents, with respect to the adequacy of long-term care facilities and services in the State;
 - (ii) Recommend any changes in such laws, regulations, policies, and actions as the Office determines to be appropriate; and
 - (iii) Facilitate public comment on the laws, regulations, policies, and actions;
 - (iv) Provide leadership to statewide systems advocacy efforts of the Office on behalf of long-term care facility residents, including coordination of systems advocacy efforts carried out by representatives of the Office; and
 - (v) Provide information to public and private agencies, legislators, the media, and other persons, regarding the problems and concerns of residents and recommendations related to the problems and concerns.

- (vi) Such determinations and positions shall be those of the Office and shall not necessarily represent the determinations or positions of the State agency or other agency in which the Office is organizationally located.
- (vii) In carrying out systems advocacy efforts of the Office on behalf of long-term care facility residents and pursuant to the receipt of grant funds under the Act, the provision of information, recommendations of changes of laws to legislators, and recommendations of changes of regulations and policies to government agencies by the Ombudsman or representatives of the Office do not constitute lobbying activities as defined by 45 CFR part 93.
- (8) Coordinate with and promote the development of citizen organizations consistent with the interests of residents; and
- (9) 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; and
- (b) The Ombudsman shall be the head of a unified statewide program and shall:
 - (1) Establish or recommend policies, procedures and standards for administration of the Ombudsman program pursuant to § 1327.11(e);
 - (2) Require representatives of the Office to fulfill the duties set forth in § 1327.19 in accordance with Ombudsman program policies and procedures.
- (c) *Designation.* The Ombudsman shall determine designation, and refusal, suspension, or removal of designation, of local Ombudsman entities and representatives of the Office pursuant to section 712(a)(5) of the Act and the policies and procedures set forth in § 1327.11(e)(6).
- (1) Where an Ombudsman chooses to designate local Ombudsman entities, the Ombudsman shall:
 - (i) Designate local Ombudsman entities to be organizationally located within public or non-profit private entities;
 - (ii) Review and approve plans or contracts governing local Ombudsman entity operations, including, where applicable, through area agency on aging plans, in coordination with the State agency; and
 - (iii) Monitor, on a regular basis, the Ombudsman program performance of local Ombudsman entities.
- (2) *Training requirements.* The Ombudsman shall establish procedures for training for certification and continuing education of the representatives of the Office, based on

model standards established by the Director of the Office of Long-Term Care Ombudsman Programs as described in section 201(d) of the Act, in consultation with residents, resident representatives, citizen organizations, long-term care providers, and the State agency, that—

- (i) Specify a minimum number of hours of initial training;
- (ii) Specify the content of the training, including training relating to Federal, State, and local laws, regulations, and policies, with respect to long-term care facilities in the State; investigative and resolution techniques; and such other matters as the Office determines to be appropriate; and
- (iii) Specify an annual number of hours of in-service training for all representatives of the Office;
- (3) Prohibit any representative of the Office from carrying out the duties described in § 1327.19 unless the representative—
 - (i) Has received the training required under paragraph (c)(2) of this section or is performing such duties under supervision of the Ombudsman or a designated representative of the Office as part of certification training requirements; and
 - (ii) Has been approved by the Ombudsman as qualified to carry out the activity on behalf of the Office;
- (4) The Ombudsman shall investigate allegations of misconduct by representatives of the Office in the performance of Ombudsman program duties and, as applicable, coordinate such investigations with the State agency in which the Office is organizationally located, agency hosting the local Ombudsman entity and/or the local Ombudsman entity.
- (5) Policies, procedures, or practices which the Ombudsman determines to be in conflict with the laws, policies, or procedures governing the Ombudsman program shall be sufficient grounds for refusal, suspension, or removal of designation of the representative of the Office and/or the local Ombudsman entity.
- (d) *Ombudsman program information.* The Ombudsman shall manage the files, records, and other information of the Ombudsman program, whether in physical, electronic, or other formats, including information maintained by representatives of the Office and local Ombudsman entities pertaining to the cases and activities of the Ombudsman program. Such files, records, and other information are the property of the Office. Nothing in this provision shall prohibit a representative of the Office or a local Ombudsman entity from