



STATE OF DELAWARE
STATE COUNCIL FOR PERSONS WITH DISABILITIES
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June 21, 2011

Ms. Rita Landgraf, Cabinet Secretary
Department of Health and Social Services
Administration Building - Holloway Campus
1901 N. DuPont Highway
New Castle, DE 19720

RE: S.B. 102 [Long-term Care Ombudsman]

Dear Secretary Landgraf:

The State Council for Persons with Disabilities (SCPD) has reviewed S.B. 102 which keeps the Long-term Care Ombudsman program at Delaware Department of Health & Social Services (DHSS), but allows it to be located outside the Division of Aging and Adults with Physical Disabilities (DSAAPD). This change is required by the Federal Administration on Aging to keep the Ombudsman program in a separate Division from the long term care facilities. SCPD has the following observations.

This change is ostensibly prompted by the placement of State long-term care facilities under DSAAPD rather than the Division of Public Health (DPH). Consistent with the attached March 3, 2011 DSAAPD presentation to the JFC, DSAAPD assumed responsibility for State long-term care facilities effective January 1, 2011. Eighty-nine percent (89%) of DSAAPD staff are now employed in the State nursing homes. It is understandable that the federal Administration on Aging would identify a conflict of interest for the Ombudsman who is expected to independently monitor such facilities. The relevant federal statute (attached) prohibits or discourages conflicts of interest. See also the attached NCCNHR resource paper entitled "Conflict of Interest and the Long-term Care Ombudsman Program (July, 2009). According to the attached DSAAPD JFC presentation, the Department plans to place the Ombudsman within the Office of the Secretary, reporting to the DHSS Director of Constituent Relations.

The transfer of the Ombudsman from DSAAPD to the Office of the Secretary is an improvement. However, there is obviously potential for conflicts with placement in any part of DHSS. Moreover, the attached federal law requires the provision of "adequate legal counsel...without conflict of interest." At a minimum, it would be preferable for DHSS to prepare an MOU or other document assuring the independence of the

Ombudsman. A better alternative would be to amend the enabling statute by adding the following sentences to §1150:

The Department shall serve as the administering agency for the Office while ensuring its independence and freedom from conflicts of interest through regulation, interagency agreement, or other written assurances which shall include, without limitation, the availability of legal counsel without conflict of interest.

The latter provision could be addressed through an interagency agreement with the Attorney General's Office. Alternatively, the Legislature could consider placement of the Ombudsman with a different State agency. For example, to obviate conflicts of interest, the Developmental Disabilities Council and State Council for Persons with Disabilities are placed administratively with the Department of Homeland Security. Cf. Title 29 Del.C. §8210.

SCPD informally shared its observations with the DHSS Policy Advisor on June 15, 2011. Given the DHSS response, Council has agreed to defer submitting comments to the General Assembly based on the Department's assurance that interested agencies could meet in the fall to discuss the aforementioned concerns and its receptiveness to some mechanisms being established and implemented to ensure impartiality and obviate potential conflicts of interest. In addition, SCPD respectfully requests copies of any draft agreements or memorandums of understanding that may be developed prior to meeting.

Thank you for your consideration and please contact SCPD if you have any questions or comments regarding our observations on the proposed legislation.

Sincerely,

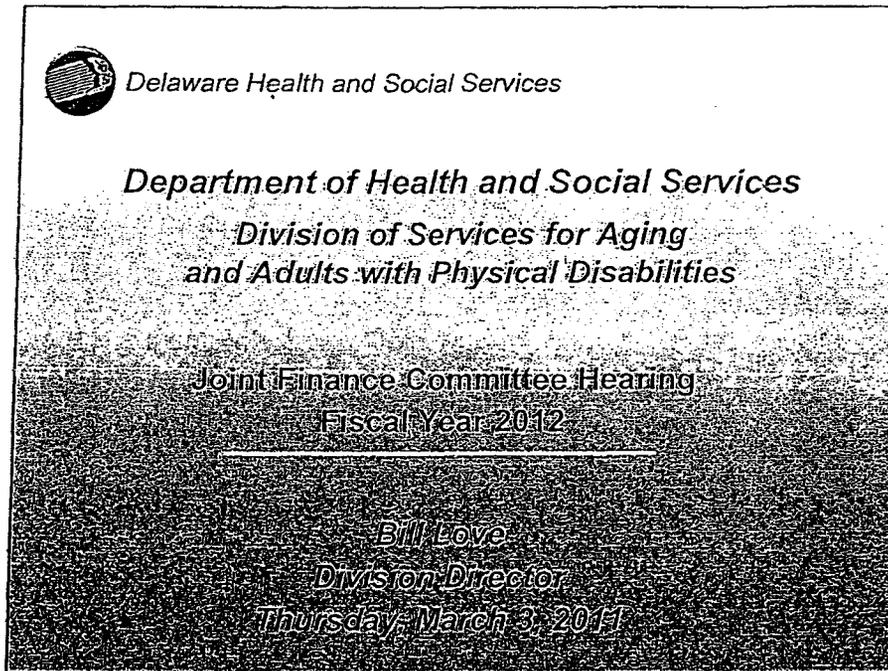


Daniese McMullin-Powell, Chairperson
State Council for Persons with Disabilities

cc: Mr. Brian Hartman, Esq.
Ms. Deborah Gottschalk
Ms. Kathleen Weiss
Mr. William Love
Ms. Lisa Bond
Ms. Joanne Finnigan
Developmental Disabilities Council
Governor's Advisory Council for Exceptional Citizens

sb 102 ombudsman 6-21-11

EXCERPT



Good afternoon Representative Williams, Senator McDowell, and members of the Joint Finance Committee. My name is Bill Love and I am the Director of the Division of Services for Aging and Adults with Physical Disabilities. Thank you for the opportunity today to discuss our issues and priorities and to share with you the work we are doing to build access to services and supports for Delawareans who are aging and those with disabilities. I also want to express my thanks to Governor Markell, OMB Director Visalli, Secretary Landgraf, and members of the Joint Finance Committee for your strong support of our efforts and your ability to provide sufficient resources for us to maintain, and in some cases expand, access to community-based services in spite of the challenging economic times.

Before starting, I'd like to introduce Lisa Bond, who is our agency's Deputy Director in charge of our community-based services and responsible for many of the initiatives I will discuss; Al Griffith who is our Chief Financial Officer; John Schmitt who is wearing more than one hat today as the Director of Emily P. Bissell Hospital and Acting Director of the Delaware Hospital for the Chronically Ill, and Dr. Lois Quinlan, who is Director of the Governor Bacon Health Center.



Delaware Health and Social Services

Overview & Accomplishments

Agency Snapshot

- Staff: 883 includes Nurses, CNA's, Planners, Contract & Program Managers, Case Managers, Fiscal & Administrative staff (includes long-term care facilities)
- Total Budget: \$79.9 M (approximately 50% of funding for community programs is federal)
- Service delivery is a partnership between DSAAPD and contracted providers
- Over 30 providers are used for direct service delivery
- Client assessment, case management and program oversight provided by DSAAPD are vital to service delivery
- Funding: State Social Services Block Grant, Medicaid, Older Americans Act Health Fund (Tobacco)

Delaware Health and Social Services

As you will note, our Division's budget and staff complement have grown substantially since our presentation at last year's Joint Finance Committee hearing. This increase is a result of the transition of three long-term care facilities which I will discuss in more detail later. About 89% of our staff work in these facilities with about 70% of our budget allocated to them. Over time as we work to build access to community-based services and deflect admissions to our facilities, we hope to change this allocation of resources.

Much of the Division's community-based services are provided by community organizations with whom we contract with oversight and case management provided by our staff. A significant portion of the funding for community-based services is from federal sources including the Administration on Aging, the Social Services Block Grant, and Medicaid. In addition, we work diligently to bring additional grant funding to Delaware and have been awarded \$785,000 in grants over the past two years which has enabled us to develop the Aging and Disability Resource Center, expand respite services, develop additional legal support services for our residents, and enhance nursing home transition services.



Delaware Health and Social Services

Overview & Accomplishments

Organizational Restructuring (continued)

- Integration of three Long Term Care facilities (State-operated)
 - Smooth transition for staff and residents
 - Integration of facility service functions with DSAAPD operations
 - Deflecting admissions and transitioning individuals to the community
 - Comprehensive assessment of each resident
 - Ensures access to community-based supports for all long term care residents
- Transfer of Long Term Care Ombudsman Program (LTCOP) and Adult Protective Services (APS)
 - Phase in transition to Office of the Secretary
 - Enhance service model for constituent services in Delaware
 - Increase visibility of these services

Delaware Health and Social Services

We are now working hard to incorporate the operation of the facilities and are committed to a smooth transition for residents, their families and staff. This has been the outcome to date. We are also committed to ensuring referrals for admission to the facilities have access to community-based services and have taken steps to facilitate this so that we can deflect admissions of those who can be appropriately supported in the community and who want to remain in the community. As previously noted, DHSS will be completing a comprehensive, independent assessment of each resident to identify those interested in returning to the community and what their support needs are. This will be consistent with meeting client needs as well as in compliance with the Olmstead Supreme Court decision.

The Long-Term Care Ombudsman Program and Adult Protective Services Program are transitioning to the Office of the Secretary and will report to Kathi Weiss, the DHSS Director of Constituent Relations. This will enable the Department to enhance these services for all Delawareans. This transition is also proceeding smoothly for staff and clients.

CHAPTER 2—OMBUDSMAN PROGRAMS

Section. 711. DEFINITIONS.

As used in this chapter:

- (1) OFFICE.—The term "Office" means the office established in section 712(a)(1)(A).
 - (2) OMBUDSMAN.—The term "Ombudsman" means the individual described in section 712(a)(2).
 - (3) LOCAL OMBUDSMAN ENTITY.—The term "local Ombudsman entity" means an entity designated under section 712(a)(5)(A) to carry out the duties described in section 712(a)(5)(B) with respect to a planning and service area or other substate area.
 - (4) PROGRAM.—The term "program" means the State Long-Term Care Ombudsman program established in section 712(a)(1)(B).
 - (5) REPRESENTATIVE.—The term "representative" includes an employee or volunteer who represents an entity designated under section 712(a)(5)(A) and who is individually designated by the Ombudsman.
 - (6) RESIDENT.—The term "resident" means an older individual who resides in a long-term care facility.
- (42 U.S.C. 3058f)

Section. 712. STATE LONG-TERM CARE OMBUDSMAN PROGRAM.

(a) ESTABLISHMENT.—

(1) IN GENERAL.—In order to be eligible to receive an allotment under section 703 from funds appropriated under section 702 and made available to carry out this chapter, a State agency shall, in accordance with this section—

- (A) establish and operate an Office of the State Long-Term Care Ombudsman; and
- (B) carry out through the Office a State Long-Term Care Ombudsman program.

(2) OMBUDSMAN.—The Office shall be headed by an individual, to be known as the State Long-Term Care Ombudsman, who shall be selected from among individuals with expertise and experience in the fields of long-term care and advocacy.

(3) FUNCTIONS.—The Ombudsman shall serve on a fulltime basis, and shall, personally or through representatives of the Office—

- (A) 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 the residents (including the welfare and rights of the residents with respect to the appointment and activities of guardians and representative payees), of—
 - (I) providers, or representatives of providers, of long-term care services;
 - (II) public agencies; or
 - (III) health and social service agencies;
- (B) provide services to assist the residents in protecting the health, safety, welfare, and rights of the residents;
- (C) inform the residents about means of obtaining services provided by providers or agencies described in subparagraph (A)(ii) or services described in subparagraph (B);
- (D) ensure that the residents have regular and timely access to the services provided through the Office and that the residents and complainants receive timely responses from representatives of the Office to complaints;
- (E) represent the interests of the residents before governmental agencies and seek administrative, legal, and other remedies to protect the health, safety, welfare, and rights of the residents;
- (F) provide administrative and technical assistance to entities designated under paragraph (5) to assist the entities in participating in the program;
- (G)
 - (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;

(H)

(i) provide for training representatives of the Office;

(ii) promote the development of citizen organizations, to participate in the program; and

(iii) provide technical support for the development of resident and family councils to protect the well-being and rights of residents; and

(I) carry out such other activities as the Assistant Secretary determines to be appropriate.

(4) CONTRACTS AND ARRANGEMENTS.—

(A) IN GENERAL.—Except as provided in subparagraph (B) the State agency may establish and operate the Office, and carry out the program, directly, or by contract or other arrangement with any public agency or nonprofit private organization.

(B) LICENSING AND CERTIFICATION ORGANIZATIONS; ASSOCIATIONS.—The State agency may not enter into the contract or other arrangement described in subparagraph (A) with—

(i) an agency or organization that is responsible for licensing or certifying long-term care services in the State; or

(ii) an association (or an affiliate of such an association) of long-term care facilities, or of any other residential facilities for older individuals.

(5) DESIGNATION OF LOCAL OMBUDSMAN ENTITIES AND REPRESENTATIVES.—

(A) DESIGNATION.—In carrying out the duties of the Office, the Ombudsman may designate an entity as a local Ombudsman entity, and may designate an employee or volunteer to represent the entity.

(B) DUTIES.—An individual so designated shall, in accordance with the policies and procedures established by the Office and the State agency—

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(i) provide services to protect the health, safety, welfare and rights of residents;

(ii) ensure that residents in the service area of the entity have regular, timely access to representatives of the program and timely responses to complaints and requests for assistance;

(iii) identify, investigate, and resolve complaints made by or on behalf of residents that relate to action, inaction, or decisions, that may adversely affect the health, safety, welfare, or rights of the residents;

(iv) represent the interests of residents before government agencies and seek administrative, legal, and other remedies to protect the health, safety, welfare, and rights of the residents;

(v)

(I) review, and if necessary, comment on any existing and proposed laws, regulations, and other government policies and actions, that pertain to the rights and well-being of residents; and

(II) facilitate the ability of the public to comment on the laws, regulations, policies, and actions;

(vi) support the development of resident and family councils; and

(vii) carry out other activities that the Ombudsman determines to be appropriate.

(C) ELIGIBILITY FOR DESIGNATION.—Entities eligible to be designated as local Ombudsman entities, and individuals eligible to be designated as representatives of such entities, shall—

(i) have demonstrated capability to carry out the responsibilities of the Office;

(ii) be free of conflicts of interest and not stand to gain financially through an action or potential action brought on behalf of individuals the Ombudsman serves;

(iii) in the case of the entities, be public or nonprofit private entities; and

(iv) meet such additional requirements as the Ombudsman may specify.

(D) POLICIES AND PROCEDURES.—

(i) IN GENERAL.—The State agency shall establish, in accordance with the Office, policies and procedures for monitoring local Ombudsman entities designated to carry out the duties of the Office.

(ii) POLICIES.—In a case in which the entities are grantees, or the representatives are employees, of area agencies on aging, the State agency shall develop the policies in consultation with the area agencies on aging. The policies shall provide for participation and comment by the agencies and for resolution of concerns with respect to case activity.

(iii) CONFIDENTIALITY AND DISCLOSURE.—The State agency shall develop the policies and procedures in accordance with all provisions of this subtitle regarding confidentiality and conflict of interest.

(b) PROCEDURES FOR ACCESS.—

(1) IN GENERAL.—The State shall ensure that representatives of the Office shall have—

(A) access to long-term care facilities and residents;

(B)(i) appropriate access to review the medical and social records of a resident, if—

(I) the representative has the permission of the resident, or the legal representative of the resident; or

(II) the resident is unable to consent to the review and has no legal representative; or

(ii) access to the records as is necessary to investigate a complaint if—

(I) a legal guardian of the resident refuses to give the permission;

(II) a representative of the Office has reasonable cause to believe that the guardian is not acting in the best interests of the resident; and

(III) the representative obtains the approval of the Ombudsman;

(C) access to the administrative records, policies, and documents, to which the residents have, or the

general public has access, of long-term care facilities; and

(D) access to and, on request, copies of all licensing and certification records maintained by the State with respect to long-term care facilities.

(2) PROCEDURES.—The State agency shall establish procedures to ensure the access described in paragraph (1).

(c) REPORTING SYSTEM.—The State agency shall establish a statewide uniform reporting system to—

(1) collect and analyze data relating to complaints and conditions in long-term care facilities and to residents for the purpose of identifying and resolving significant problems; and

(2) submit the data, on a regular basis, to—

(A) the agency of the State responsible for licensing or certifying long-term care facilities in the State;

(B) other State and Federal entities that the Ombudsman determines to be appropriate;

(C) the Assistant Secretary; and

(D) the National Ombudsman Resource Center established in section 202(a)(21).

(d) DISCLOSURE.—

(1) IN GENERAL.—The State agency shall establish procedures for the disclosure by the Ombudsman or local Ombudsman entities of files maintained by the program, including records described in subsection (b)(1) or (c).

(2) IDENTITY OF COMPLAINANT OR RESIDENT.—The procedures described in paragraph (1) shall—

(A) provide that, subject to subparagraph (B), the files and records described in paragraph (1) may be disclosed only at the discretion of the Ombudsman (or the person designated by the Ombudsman to disclose the files and records); and

(B) prohibit the disclosure of the identity of any complainant or resident with respect to whom the Office maintains such files or records unless—

(i) the complainant or resident, or the legal representative of the complainant or resident, consents to the disclosure and the consent is given in writing;

(ii) (I) the complainant or resident gives consent orally; and

(II) the consent is documented contemporaneously in a writing made by a representative of the Office in accordance with such requirements as the State agency shall establish; or

(iii) the disclosure is required by court order.

(e) CONSULTATION.—In planning and operating the program, the State agency shall consider the views of area agencies on aging, older individuals, and providers of long-term care.

(f) CONFLICT OF INTEREST.—The State agency shall—

(1) ensure that no individual, or member of the immediate family of an individual, involved in the designation of the Ombudsman (whether by appointment or otherwise) or the designation of an entity designated under subsection (a)(5), is subject to a conflict of interest;

(2) ensure that no officer or employee of the Office, representative of a local Ombudsman entity, or member of the immediate family of the officer, employee, or representative, is subject to a conflict of interest;

(3) ensure that the Ombudsman—

(A) does not 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;

(B) does not 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;

(C) is not employed by, or participating in the management of, a long-term care facility; and

(D) does not receive, or have 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; and

(4) establish, and specify in writing, mechanisms to identify and remove conflicts of interest referred to in paragraphs (1) and (2), and to identify and eliminate the relationships described in subparagraphs (A) through (D) of paragraph (3), including such mechanisms as—

(A) the methods by which the State agency will examine individuals, and immediate family members, to identify the conflicts; and

(B) the actions that the State agency will require the individuals and such family members to take to remove such conflicts.

(g) LEGAL COUNSEL.—The State agency shall ensure that—

(1)(A) adequate legal counsel is available, and is able, without conflict of interest, to—

(i) provide advice and consultation needed to protect the health, safety, welfare, and rights of residents; and

(ii) assist the Ombudsman and representatives of the Office in the performance of the official duties of the Ombudsman and representatives; and

(B) legal representation is provided to any representative of the Office against whom suit or other legal action is brought or threatened to be brought in connection with the performance of the official duties of the Ombudsman or such a representative; and

(2) the Office pursues administrative, legal, and other appropriate remedies on behalf of residents.

(h) ADMINISTRATION.—The State agency shall require the Office to—

(1) prepare an annual report—

(A) describing the activities carried out by the Office in the year for which the report is prepared;

(B) containing and analyzing the data collected under subsection (c);

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

(D) containing recommendations for—

(i) improving quality of the care and life of the residents; and

(ii) protecting the health, safety, welfare, and rights of the residents;

(E)(i) analyzing the success of the program including success in providing services to residents of board and care facilities and other similar adult care facilities; and

(ii) identifying barriers that prevent the optimal operation of the program; and

(F) providing policy, regulatory, and legislative recommendations to solve identified problems, to resolve the complaints, to improve the quality of care and life of residents, to protect the health, safety, welfare, and rights of residents, and to remove the barriers;

(2) 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, in the State, and recommend any changes in such laws, regulations, and policies as the Office determines to be appropriate;

(3)(A) provide such information as the Office determines to be necessary to public and private agencies, legislators, and other persons, regarding—

(i) the problems and concerns of older individuals residing in long-term care facilities; and

(ii) recommendations related to the problems and concerns; and

(B) make available to the public, and submit to the Assistant Secretary, the chief executive officer of the State, the State legislature, the State agency responsible for licensing or certifying long-term care facilities, and other appropriate governmental entities, each report prepared under paragraph (1);

- [15]
- (4)(A) not later than 1 year after the date of the enactment of this title, establish procedures for the training of the representatives of the Office, including unpaid volunteers, based on model standards established by the Director of the Office of Long-Term Care Ombudsman Programs, in consultation with representatives of citizen groups, long-term care providers, and the Office, that—
- (A) specify a minimum number of hours of initial training;
 - (B) specify the content of the training, including training relating to—
 - (i) Federal, State, and local laws, regulations, and policies, with respect to long-term care facilities in the State;
 - (ii) investigative techniques; and
 - (iii) such other matters as the State determines to be appropriate; and
 - (C) specify an annual number of hours of in-service training for all designated representatives;
- (5) prohibit any representative of the Office (other than the Ombudsman) from carrying out any activity described in subparagraphs (A) through (G) of subsection (a)(3) unless the representative—
- (A) has received the training required under paragraph (4); and
 - (B) has been approved by the Ombudsman as qualified to carry out the activity on behalf of the Office;
- (6) coordinate ombudsman services with the protection and advocacy systems for individuals with developmental disabilities and mental illnesses established under—

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- (A) subtitle C of the Developmental Disabilities Assistance and Bill of Rights Act of 2000 ; and
 - (B) the Protection and Advocacy for Mentally Ill Individuals Act of 1986 (42 U.S.C. 10801 et seq.);
- (7) coordinate, to the greatest extent possible, ombudsman services with legal assistance provided under section 306(a)(2)(C), through adoption of memoranda of understanding and other means;
- (8) coordinate services with State and local law enforcement agencies and courts of competent jurisdiction; and
- (9) permit any local Ombudsman entity to carry out the responsibilities described in paragraph (1), (2), (3), (6), or (7).
- (i) LIABILITY.—The State shall ensure that no representative of the Office will be liable under State law for the good faith performance of official duties.

(j) NONINTERFERENCE.—The State shall—

(1) ensure that willful interference with representatives of the Office in the performance of the official duties of the representatives (as defined by the Assistant Secretary) shall be unlawful;

(2) prohibit retaliation and reprisals by a long-term care facility or other entity with respect to any resident, employee, or other person for filing a complaint with, providing information to, or otherwise cooperating with any representative of, the Office; and

(3) provide for appropriate sanctions with respect to the interference, retaliation, and reprisals.

(42 U.S.C. 3058g)

Section. 713. REGULATIONS.

The Assistant Secretary shall issue and periodically update regulations respecting—

(1) conflicts of interest by persons described in paragraphs (1) and (2) of section 712(f); and

(2) the relationships described in subparagraphs (A) through (D) of section 712(f)(3).

(42 U.S.C. 3058h)



NCCNHR

The National Consumer Voice For Quality Long-Term Care

CONFLICT OF INTEREST AND THE LONG-TERM CARE OMBUDSMAN PROGRAM

RESOURCE PAPER

JULY 2009

Prepared by Sara S. Hunt, MSSW

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ACKNOWLEDGEMENTS

ADVISORS

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ABOUT THE AUTHOR

Sara Hunt, MSSW, is a consultant for the National Long-Term Care Ombudsman Resource Center with expertise in the areas of ombudsman training, policy development, program management, and care planning and quality of life. Sara was the State Long-Term Care Ombudsman in Louisiana for five years (1981-1986) and has served as a consultant to the Ombudsman Resource Center since 1987. For more than thirty years, Sara has been developing and conducting training programs, most of those for ombudsmen. She is a co-author of *Nursing Homes: Getting Good Care There*.

ABOUT THE SESSION SUMMARY AND RESOURCE GUIDE

This paper was supported, in part, by a grant, No. 90AM2690, from the Administration on Aging, Department of Health and Human Services. Grantees undertaking projects under government sponsorship are encouraged to express freely their findings and conclusions. Points of view or opinions do not therefore necessarily represent official Administration on Aging policy.

CONFLICT OF INTEREST AND THE LONG-TERM CARE OMBUDSMAN PROGRAM

EXECUTIVE SUMMARY

Identifying and preventing, removing, or remedying conflicts of interest is not a simple task. There is not an established solution for every potential conflict of interest situation. Addressing conflict of interest requires continual vigilance, dialogue, assessing the potential impact on residents, and thoughtful strategies to remove or remedy the conflict. The easiest solution is to avoid the conflict of interest.

This paper discusses the Older Americans Act provisions and dimensions of conflict of interest. Key resources and approaches utilized by several state and local ombudsman programs are included as examples of program management practices to address issues.

The following actions are recommended.

- Define conflict of interest for program placement and for individuals associated with the ombudsman program.
- Align the state's ombudsman program statute, regulations, and/or policies to be consistent with the current conflict of interest provisions in the Older Americans Act.
- Provide tools for conflict of interest screens to be used for individuals and for entities designated as a local ombudsman program.
- Be continually vigilant regarding conflict of interest and the potential for perceived conflicts of interest. Reinforce this through ongoing education.
- Create a process for removing or remedying conflicts of interest, both actual and potential.
- Establish a process for reviewing proposed remedies and criteria for accepting or rejecting remedies, and outcomes.

CONFLICT OF INTEREST

This paper will discuss conflicts of interest for the Long-Term Care Ombudsman Program and for individual long-term care ombudsmen, approaches to identify and remedy conflicts when they occur, and resources for further guidance.

Conflict of interest provisions have been part of the Long-Term Care Ombudsman Program's federal mandate from 1978 when the Program was included in the Older Americans Act. The 1992 and 2000 amendments to the Act added specificity to those provisions. What conflict of interest means, how to identify conflicts, and how to avoid or remedy conflicts, have been the topics of much discussion, debate, and study, from 1978 to the present. Refer to the appendix for a list of resources on this topic, including the Ombudsman Program's conflict of interest provisions in the Older Americans Act and sample provisions and tools.

DEFINITION

The Business Dictionary has two definitions of conflict of interest¹. Insertions illustrate how the definitions may be applied to the Long-Term Care Ombudsman Program.

- Situation that has the potential to undermine the impartiality of a person [long-term care ombudsman] because of the possibility of a clash between the person's [ombudsman's] self-interest and professional-interest or public-interest.
- Situation where a party's [ombudsman's] responsibility to a second-party [employer or another program] limits its ability to discharge its responsibility to a third-party [resident or client].

Conflict of interest for ombudsman programs and for individual ombudsmen is defined in the Georgia Policies and Procedures.

"A conflict of interest exists in the Long-Term Care Ombudsman Program (LTCOP) when other interests intrude upon, interfere with, or threaten to negate the ability of the LTCOP to advocate without compromise on behalf of long-term care facility residents."²

Indiana's Ombudsman Program Rules have an added dimension to the definition of conflict of interest.

"Conflict of interest means that other interests intrude upon, interfere with, threaten to negate, or give the appearance of interfering with or negating the ability of the state ombudsman, state level staff of the office, local ombudsmen, volunteers, or local ombudsman entities to advocate without compromise on behalf of residents of long term care facilities. It also means any situation that would create a reasonable appearance of a conflict of interest."³

1 Conflict of interest. BusinessDictionary.com. Retrieved May 06, 2009, from BusinessDictionary.com website: <http://www.businessdictionary.com/definition/conflict-of-interest.html>
2 Georgia Long-Term Care Ombudsman Program: Policies and Procedures. Part II, 401.1a. December 2008.
3 Rule 7. Indiana Ombudsman Program. 460 IAC 1-7-2 Definitions. Section 2(d).

OLDER AMERICANS ACT

The conflict of interest provisions for the Long-Term Care Ombudsman Program in the Older Americans Act are specific. Refer to the appendix for an excerpt of these provisions. For individuals who are familiar with these provisions, questions may arise regarding their application. Over the years, there have been several letters from the Administration on Aging to states responding to questions about the application of conflict of interest provisions.

In 1981, the Administration on Aging issued a program instruction containing supplemental guidance in the implementation of the long-term care ombudsman program.⁴ There are almost two pages discussing conflict of interest and the organizational location of the program.

"Determination of the placement of the program, whether in-house or outside the State Agency, should consider the need for the Long-Term Care Ombudsman to exercise independence in action and judgment, free from the control of significant influence by any person or organization which seeks to interfere with vigorous and impartial investigation and/or resolution of complaints." - AoA-PI-81-8, page 8

When the 1992 amendments to the Act added specificity to the conflict of interest provisions, additional questions arose regarding the implementation of the provisions. The report language from the Senate⁵ clarifies the intent of the provisions and states the importance of public perception when examining ombudsman conflict of interest.

"The ability of ombudsmen to independently and fully carry out their functions, including the public perception of the program's independence, is crucial to the program's success and, therefore, addresses this through several improved provisions pertaining to actual and potential conflicts of interest. The Committee is concerned that every effort be made to minimize any perception of conflicts of interest affecting the program and directs the Commissioner to issue regulations on this and the Committee urges the Commissioner and the States to vigilantly monitor the program in this regard." - Senate Report 102-151, page 106

The significance of the ombudsman's ability to act to resolve issues and to be perceived as an independent voice on behalf of residents is stated in a letter from the Administration on Aging.⁶

"The ombudsman's ability to compel action is to a very large degree dependent upon the strength of their perceived integrity and the ability to truly act upon the wishes of their clients. In other words, to the extent the ombudsman is not perceived as being truly independent to act on behalf of the complainant, his/her ability to fully and vigorously represent the client is limited. Anything that diminishes the actual or perceived independence of the program is likely to diminish the ombudsman's ability to compel any other individual or entity...to take appropriate action in response to the complaint carried by the ombudsman. In truth, ombudsmen have very little in their tool box, so to speak, besides their word, their knowledge, their tenacity, and their freedom to act. If those attributes are not impaired, then ombudsmen do not need many more tools." - page 7

SOURCES OF CONFLICT OF INTEREST FOR THE OMBUDSMAN PROGRAM

The Institute of Medicine's seminal study of the Long-Term Care Ombudsman Program, *Real People, Real Problems: An Evaluation of the Long-Term Care Ombudsman Programs of the Older Americans Act*, devoted Section 4 to

⁴ Administration on Aging, PI-81-8. Issuance date: January 19, 1981.

⁵ U.S. Senate Report 102-151, the report of the Senate Committee on Labor and Human Resources to report out S. 243. September 13, 1991. From memo to Sue Wheaton from Bill Benson. February 18, 1993.

⁶ Administration on Aging letter to L. N. Shedd and J. Hoberman. from William Benson, Deputy Assistant Secretary for Aging November 8, 1996.

conflicts of interest. Four types of conflicts of interest⁷ are identified in the study's report:

- Organizational: location and governance,
- Individual,
- Willful interference,
- Sources of legal counsel.

This paper discusses *organizational* and *individual* conflicts. The study discusses the difficulty in identifying and eliminating or remedying conflicts of interest. There is a direct impact on residents if conflict of interest issues are not addressed.

"Conflicts of interest may arise from the structure in which the ombudsman program exists, from situations faced by the ombudsman, and from individual ombudsman relationships or conduct. The OAA [Older Americans Act] charges the state agency and the state ombudsman with responsibility to establish mechanisms to identify and remove conflicts of interest pertinent to the ombudsmen (both state and local), their immediate family members, and the entities that host the program.

Implementation of this policy is very difficult to actualize. It is almost impossible to eliminate all potential conflicts of interest because of how the LTC [long-term care] ombudsman programs operate and where they are located... The OAA has clearly designated the LTC ombudsman program as the voice representing the LTC resident to government, yet in most cases the program continues to be housed within state and local governments that are increasingly responsible for service provision to older persons.

The Ombudsman Program has a mandate to focus on the individual resident. If the ombudsman finds him or herself in a conflict of interest situation (whether it is a conflict of loyalty, commitment, or control), the resident, even more than the program may suffer. The resident's problem may not be resolved, certain avenues of resolution may be foreclosed, the resident's voice may not be heard by policymakers, and the resident's interest will be inadequately represented or altogether absent from the table at which public policy is made."⁸

Three dimensions of conflict of interest are described to provide additional guidance in identifying conflicts.⁹

- *Conflicts of Loyalty:* These involve issues of judgment and objectivity. These are the typical situations almost everyone understands—financial and employment considerations. An ombudsman's ability to be fair and a resident advocate might be questioned if the ombudsman also is a consultant to a facility, a board member of a facility or management company, or works as a case manager with responsibility for assisting individuals with moving into long-term care facilities. Loyalty may also be an issue if the individual is an ombudsman in a facility which was the ombudsman's previous employer.

7 *Real People, Real Problems: An Evaluation of the Long-Term Care Ombudsman Programs of the Older Americans Act.* Institute of Medicine. 1995. <http://www.nap.edu/openbook.php?isbn=N1000028>

8 *Id.*, pp. 108-109.

9 *Id.*, p. 107.

- *Conflicts of Commitment:* These are issues of time and attention. Toward which goals or obligations does one direct one's efforts—i.e., one's time and energies? Concerns about the adequacy of resources come into play because pressures to do more occur when available resources are limited. In regional or local programs, ombudsmen who assume several other employment-related responsibilities in addition to their ombudsman responsibilities may experience conflicts of commitment.
- *Conflicts of Control:* These are issues of independence. Do other interests, priorities, or obligations of the agency that houses the ombudsman materially interfere with the ombudsman's advocacy on behalf of residents? Do administrative or political forces materially interfere with the professional judgment of the ombudsman? Is the ombudsman able to act responsibly without fear of retaliation by superiors?

EMERGING CONFLICTS IN A CHANGING LONG-TERM CARE SYSTEM

This 1995 study was prescient in discussing conflicts that may arise as the state units on aging, the area agencies on aging, and/or the ombudsman program expand their services as part of a changing long-term care system. Examples that remain relevant today are included in Section 4, Conflicts of Interest, and in Section 7, Expansion of the Long-Term Care Ombudsman Program, of the study.

*"...if the LTC ombudsman program expands its purview to include community-based LTC services in addition to institutional LTC, some of the complaints investigated by the program will probably involve services that are funded or even operated directly by the SUA [state unit on aging] or by local entities, such as AAAs [area agencies on aging] housing the local ombudsman program. Second, the role of the aging network is expanding to include far greater responsibilities for aspects of care for residents of LTC facilities than was envisioned when the OAA was written...Some are responsible for the preadmission screening of nursing facility residents; some either contract for or operate services that are provided to residents of LTC facilities; some are responsible for providing adult protective services; and some are responsible for the operation of home- and community-based service programs that operate under waivers granted by the federal government. Any of these AAA functions can lead to conflicts of interest. The housing and funding of the ombudsman program in AAAs that directly provide in-home supportive services to residents of LTC facilities creates the same conflicts as would occur if the ombudsman program were housed or funded in a nursing or B&C [board and care] home association."*¹⁰

*"An ombudsman program, at the federal, state, or local level, may be constrained—either implicitly or explicitly—from intervening on behalf of consumers to challenge eligibility decisions, speak out publicly about long waiting lists, or comment on proposed policy if the program is housed within the agency responsible for such programs and policies. Likewise, consumers may hesitate to contact an ombudsman whose phone number and office location are the same as the case manager whose actions they wish to question."*¹¹

IDENTIFYING AND REMOVING OR REMEDYING CONFLICTS

It is impossible to avoid all conflicts of interest, actual and perceived, in the Long-Term Care Ombudsman Program. There is not a perfect structure for the Long-Term Care Ombudsman Program that eliminates all conflicts of interest. There are some that seem to minimize conflicts. States where the Ombudsman Program is either a separate entity within government or is operated by contract and where the local ombudsmen are employees of the state

¹⁰ Ibid., p. 111.
¹¹ Ibid., p.224.

ombudsman, report few conflicts that are not addressed by screening prior to employment.¹² Prohibiting all conflicts of interest may not be desirable when programs recruit staff and volunteers. Ombudsman programs often seek to recruit individuals who have some long-term care experience. If programs did not consider any individuals with a potential conflict of interest, the advocacy skills of many excellent ombudsmen would not have been available to residents. The Older Americans Act acknowledges this reality by permitting the removal of conflicts of interest.

Identifying and preventing, removing or remedying conflicts of interest is not a simple task. There is not an established solution for every potential conflict of interest situation. Addressing conflict of interest requires continual vigilance, dialogue, assessing the potential impact on residents, and thoughtful strategies to remove or remedy the conflict. The easiest solution is to avoid the conflict of interest.

There are four key documents which contain descriptions of situations that may be actual or perceived conflict of interest and salient questions for ombudsman programs to use in determining if a conflict exists. Suggested solutions or guidance in developing a remedy is given. The fifth document, *Long-Term Care Ombudsman Program Core Principles*, contains principles for guidance in avoiding or minimizing conflicts of interest. Refer to the Resource List in the appendix for more information:

- *Charting the Long-Term Care Ombudsman Program's Role in a Modernized Long-Term Care System,*
- *Guidance for Long Term Care Ombudsman Program, Participation in Developing Consumer Advocacy Programs,*
- *Home Care Ombudsman Affinity Group. Teleconference Summary,*
- *Real People, Real Problems: An Evaluation of the Long-Term Care Ombudsman Programs of the Older Americans Act,* and
- *Long-Term Care Ombudsman Program Core Principles: Effectiveness in Representing Residents.*

TIPS FOR DEALING WITH CONFLICTS OF INTEREST

The information contained in this section is based on a review of a sample of state and local long-term care ombudsman programs' conflict of interest regulations, policies, screening tools, interviews with several state and local ombudsmen, area agency on aging directors, and documents listed in the Resource List.

States where the ombudsman program has expanded into home care or another client directed service have made few, if any, changes in their conflict of interest provisions or screening instruments. They report that every situation must be handled individually and that the basic litmus test is:

- client directed advocacy,
- public perception of the ombudsman role as an independent voice for consumers, and

¹² Interviews with state and local ombudsmen conducted in developing this paper and Estes, C. *Independence: The LTCOPs Ability to Fully Represent Residents. Appendix IV. The Long-Term Care Ombudsman Program: Rethinking and Retooling for the Future. Proceedings and Recommendations.* National Association of State Long-Term Care Ombudsman Programs. April 2008.
<http://nasop.org/papers/Bader.pdf>

- the ability to bring issues to the attention of other agencies or programs for resolution.

Specific questions and decision-making criteria are contained in the five documents in the preceding list. Refer to *Guidance for Long Term Care Ombudsman Program, Participation in Developing Consumer Advocacy Programs*, for the most comprehensive list.

The Older Americans Act places some prohibitions on the Ombudsman Program and on individual representatives of the program. These are factors such as prohibiting a direct involvement in the licensing or certification of a long-term care facility or of a provider of a long-term care service. The program may not be contracted to an entity that fulfills those licensing responsibilities. Such prohibitions generally are straightforward. The more difficult areas to determine whether a conflict of interest exists and if so, what actions to take, are the areas where questions may arise. These tips attempt to provide some guidance to programs regarding a course of action pertinent to the questionable areas. It is impossible to foresee every potential conflict and to devise a clear cut response that applies to each situation. These tips suggest a framework that is applicable to decision making and that will provide some consistency in operation for an ombudsman program.

FOUNDATION

- Define conflict of interest for program placement and for individuals associated with the ombudsman program.
- Be sure that the definition enables the program to fulfill its Older Americans Act responsibilities and to be publicly viewed as an independent voice for residents.

The Oklahoma Ombudsman Program's rules define conflict of interest as "a conflict of interest exists when any organizational or supervisory relationship, policy, or action, or individual ombudsman relationship or action conflicts with or impairs the ability of an ombudsman to carry out his or her responsibilities to investigate, resolve, or refer complaints or otherwise advocate for long-term care facility residents."¹³ This definition encompasses individual and organizational conflicts.

- Align the state's ombudsman statute, regulations, or policies to be consistent with the current conflict of interest provisions in the Older Americans Act.
- Add clarification by incorporating more specific information.

A few states have done this by drawing upon the Institute of Medicine's work or the regulations proposed by the National Association of State Long-Term Care Ombudsman Programs. The Georgia State Long-Term Care Ombudsman Program's Policies and Procedures is one example of a state that has used these resources as a basis for conflict of interest provisions. Refer to the appendix for the Georgia conflict of interest provisions.¹⁴

¹³ 340:105-11-235. Conflict of interest. revised 6-1-07.

¹⁴ Go to http://www.ltombudsman.org/uploads/File/Georgia_Policies_and_Procedures_Manual_2009.pdf
Part II, Administration of the Program, for the entire section and the complete document.

Some states list other functions which are conflicts of interest if combined with the ombudsman position such as serving as the sole witness for “do not resuscitate” orders, adult protective services, or as a resident’s guardian or agent, performing case management or pre-admission screening for residents or potential residents, or supervising other programs that may come into conflict with the ombudsman program. The identified functions are *prohibited* roles which cannot be remedied. Removal is necessary. Refer to the *Table Ombudsman Program Conflict of Interest Provisions and Recommendations*, in the appendix for other specific functions recommended by the National Association of State Long-Term Care Ombudsman Programs and in *The Long-Term Care Ombudsman Program: Rethinking and Retooling for the Future*.

Some states define “immediate family” in their rules and several states require one to three years between an individual’s employment by a long-term care provider and being an ombudsman. The Georgia, Ohio, and Oklahoma rules and policies in the appendix are examples of how states have clarified conflict of interest provisions.

- Provide tools for conflict of interest screens to be used for individuals and for entities (agencies or organizations) designated as a Local Ombudsman Program.

- Require annual renewal and signatures. The Ombudsman Compendium Chapter I, Recruitment contains a brief overview of conflict of interest provisions and documents from Oklahoma and Ohio as sample instruments.

<http://www.ltombudsman.org/sites/default/files/library/documents/Compendium-Recruitment.pdf>

The Ohio conflict of interest screen is designed for use by volunteers, employees, or board members. It asks for descriptive information if a potential conflict of interest is identified and for a waiver request or a proposed remedy to be submitted by the local program if a conflict of interest is identified. An annual renewal is required.

The Oklahoma tool is a conflict of interest statement and ethical guidelines. By reading and signing this form, an ombudsman (staff or volunteer) is agreeing to uphold the ethical guidelines and that there is no conflict of interest.

An example of an assurance by a local program with an annual renewal is the Area Ombudsman Program Assurance from Oklahoma and included in the appendix. This assurance includes statements about the agency’s freedom from conflict of interest and also specific assurances that enable the ombudsman to pursue individual and systems advocacy and other duties.

- Be continually vigilant regarding conflict of interest and the potential for perceived conflicts of interest. Reinforce this through ongoing education.

Ohio routinely includes time to discuss the role of the ombudsman in its ongoing training programs throughout the year. These sessions provide opportunities for role clarification and guidance regarding ombudsman practice. They assist in preventing conflict of interest situations. Training on ethical issues, including being aware of how an ombudsman’s actions may be perceived by consumers, is another training program that Ohio routinely conducts. One purpose is to increase ombudsman sensitivity to actions that may compromise their ability to be the resident’s advocate.

REMOVING OR REMEDYING

The Older Americans Act requires states to establish mechanisms to remove conflicts of interests that are identified. In reality, most ombudsman programs seek to find ways to remedy conflicts of interest where removing the conflict may not be a desirable outcome. The Institute of Medicine's study acknowledged this reality. "The complexity of the ombudsman program and the serious nature of its mission do not allow for easy, simple answers to remedy all the real of potential conflicts of interest."¹⁵

Examples:

The regional agency that operates the local ombudsman program also provides case management services for nursing home transition and home and community based waiver services. The ombudsman program has worked with residents who have complaints about the case management services. This regional agency is the only non-profit agency serving elders in that part of the state. The agency has a long-standing reputation as an advocate with consumer-friendly services. Removing the conflict of interest by terminating the ombudsman program's contract with this agency may not be a viable alternative if there is a way to remedy the conflict of interest.

A former nursing home administrator applies to work with the ombudsman program. There are no facilities owned or operated by the corporation where the administrator previously worked in the area covered by the local ombudsman program. It has been two months since the administrator quit her nursing home job. She has excellent expertise, is very active in the state's culture change coalition, and has a reputation for knowing the individual residents in her facility. If the ombudsman program does not employ her, she will find another job. Her expertise and perspective could be beneficial to the local ombudsman program which motivates the program to look for a remedy instead of refusing to consider her application.

Clear written and oral communication is essential. State Ombudsmen say that identifying conflicts of interest and potential remedies is easier when a specific client case example of how the conflict may arise is used to focus the dialogue. The case may be real or hypothetical, such as a case where the ombudsman and another employee of the same agency appear at a hearing, each person arguing a different perspective. How will the agency deal with this situation? How will the colleagues deal with any potential residual tension in the office? What will the client, family or public perception be about each program's ability to freely do its work?

- Create a process for removing or remedying conflicts of interest, both actual and potential.

INDIVIDUAL

The Institute of Medicine's study suggests a few mechanisms for addressing conflicts of interest when prohibitions are not applicable.¹⁶ Several of the states where the ombudsman program has expanded its role beyond the responsibilities listed in the Older Americans' Act use these actions. The key with the three disclosure options is to provide disclosure up front, as soon as the potential for conflict of interest surfaces.

¹⁵ *Real People, Real Problems*. op.cits., page 119.

¹⁶ *Ibid.*, pages 120 - 121.

The suggested mechanisms are:

- disclosure,
- disclosure with alternative options offered,
- disclosure with recusal,
- everyday ethical behavior, and
- public accountability.

Other mechanisms that programs use include:

- Providing another role for an individual until more time has elapsed between prior employment and serving in an ombudsman complaint handling capacity and there is assurance that the individual understands the ombudsman approach and resident directed advocacy. Examples of another role is data management or other administrative, non-advocacy functions.
- Ombudsman responsibilities are in facilities not owned or operated by the same corporation where the individual was previously employed.
- Provide guidance and decision making criteria for determining what type of activities may present a conflict of interest for an ombudsman or for the program, such as a work group, task force, committee, or a coalition.

The Institute of Medicine suggests the following decision-making protocol regarding LTCO participation in community groups, professional associations, or other activities.¹⁷

- Will the association (or community group or church) benefit from the "in name only" participation of the ombudsman, irrespective of the actual contribution the ombudsman makes?
- Is there a possibility that the mission of the ombudsman program will be advanced in equal proportion to the benefits that might accrue to the other group? Does the ombudsman bear responsibility for deciding on the balance of competing views and forging points of compromise, or is the ombudsman's role primarily to represent and assert the views of long-term care residents?
- Will the association, task force, or committee ensure in any final product that dissenting or minority views (if any) held by the ombudsman will be communicated?

The Georgia Ombudsman Program's policies include similar criteria.¹⁸

In determining whether LTCO participation in community groups, professional associations, or other activities constitutes a conflict of interest, the following questions shall be considered:

¹⁷ *Ibid.*, page 115.

¹⁸ Georgia Long-Term Care Ombudsman Program Policies and Procedures. Section II. 403.3. revised December 2008.

- Will the LTCOP benefit from LTCO involvement in this activity?
- Will the LTCO be able to represent and assert the views of long-term care residents in this activity?
- Will the role of the LTCO in the activity benefit residents?
- How will participating in the activity affect the public perception and the residents' perspective of the LTCOP?
- Will the LTCO be put in a position of participating in a decision about a resident without the resident's involvement or permission?

ORGANIZATIONAL

Other than the prohibited locations of the Ombudsman Program stipulated in the Older Americans Act, there is little additional guidance. The documents listed in the Resource List (appendix) discuss principles that enable a long-term care ombudsman program to fulfill its federally mandated responsibilities. There is a common theme among the documents that the program must be perceived as being independent in representing residents and able to pursue public advocacy in representing the views of residents. Some states have captured this concept in their rules, policies, and/or conflict of interest assurances that must be signed by programs.

One example is an excerpt from the Oklahoma Area Ombudsman Program Assurance required for designation of the area program as a subdivision of the Office of the State Long-Term Care Ombudsman.

*"Assurance is needed from you that the area agency:
...is not located within an organization that may impair or inhibit the ability of the Ombudsman to objectively and independently investigate and resolve complaints."*

An example of a remedy is removing the Ombudsman Program from under the supervision of the person who supervises the case management or pre-screening or adult protective services program.

Prohibitions regarding conflict of interest among board members or supervisors of the Ombudsman Program typically are included with individual conflicts of interest as previously discussed in this paper.

- Establish a process for reviewing proposed remedies and criteria for accepting or rejecting remedies, and outcomes.

The Ohio Ombudsman Program's Rules add some principles to a list of provisions that are included in the rules or policies of a few other states. Collectively, these provisions give consistent guidance for the program in developing and assessing the adequacy of proposed remedies. Program responsibilities while a decision is pending are stated.

"(D) Prior to offering an ombudsman position to an applicant or training a volunteer, the sponsoring agencies and/or regional program directors shall report any identified conflict of interest to, and may propose a remedy to, the SLTCO. The SLTCO shall report any identified conflict of interest in the state program and propose a remedy to the director of the department of aging. Within thirty days of receiving a proposed remedy, the SLTCO or the director of the department of aging shall review the nature, scope, and extent of the conflict and shall determine whether or not to allow the proposed remedy. While the decision is pending, the program responsible shall assign any individual

with a conflict of interest to duties that do not pose a conflict.

The proposed remedy shall be submitted in writing and shall reveal the nature, extent, and potential impact of the conflict of interest, and shall be a remedy which will neutralize the conflict of interest. Current employment with any type of provider is a conflict of interest that cannot be remedied. Any remedy granted shall remain in effect for as long as the conflict continues to exist to the same extent as reported and for as long as the remedy continues to work.

Examples of remedies which may be approved include, but are not limited to, remedies that assure:

- (1) The independence of the representative of the office to provide unbiased investigations, successful problem resolution, advocacy services, and other ombudsman services;*
- (2) That no employee, representative of the office, or policy board member having a conflict of interest is involved with or influences any decision to hire, or appoint, evaluate, or terminate a representative of the office;*
- (3) That no employee, representative of the office, or policy board member having a conflict of interest is involved with or influences the designation of any regional program;*
- (4) That no policy board members having a conflict of interest in their capacity as board members are involved in a complaint being handled by the program involving the entity that is the source of the conflict of interest;*
- (5) That any policy board members having a conflict of interest in their capacity as a board member will declare any conflict of interest as regards a complaint or advocacy issue, and will excuse themselves from deliberations and voting on the issue, and review of the case records; and,*
- (6) That the policy board's by-laws, the organization's position descriptions, and personnel policies reflect procedures to identify and remedy conflicts of interest and ensure independence of action for the program and its representatives.*

(E) Prior to offering an ombudsman position to an applicant or training a volunteer, the sponsoring agencies and/or regional program directors shall report any identified conflict of interest to, and may request a waiver of a conflict of interest, in writing, to the SLTCO, or in the case of the SLTCO making the request, to the director of the department of aging. Within thirty days of receiving a waiver request, the SLTCO or the director of the department of aging, as appropriate, shall review the nature, scope, and extent of the conflict and shall determine whether or not to approve the waiver. A waiver request will reveal the nature, extent, and potential impact of the conflict of interest, and will ask to determine whether sufficient circumstances exist to eliminate a conflict of interest.

(1) Any conflict of interest not waived or remedied, and any prohibition resulting therefrom, shall be recorded in the central registry.

(2) The SLTCO may take into consideration the following when determining the granting of a waiver:

- (a) The length of time an individual was affiliated with a provider;*

(b) The view of the SLTCO of the objectivity of the individual;

(c) The position held by the individual when working for a provider; and,

(d) The change in the ownership/management of a facility and the length of time since the change in ownership/management.

(F) Deliberate failure to disclose any conflict of interest or any prohibition shall be sufficient grounds for the removal of the candidate from the professional development program, the decertification of the representative, or the withdrawal of the designation of the regional program involved. Effective: 12/28/2006"¹⁹

The consequences of failure to remove or remedy a conflict of interest is clearly stated in Georgia's Policies and Procedures.

"Failure to Identify or Remedy a Conflict of Interest

a. Failure on the part of a LTCO, provider agency, or AAA to identify and report to the SLTCO a known conflict of interest shall be sufficient grounds for refusal to designate, suspension of designation, or de-designation of the LTCOP or the LTCO (II-200, above).

b. Existence of an unremedied conflict of interest shall be sufficient grounds for the de-designation of the LTCOP (II-202, above).

c. Existence of an unremedied conflict of interest shall be sufficient grounds for the suspension of or de-designation of the LTCO (II-204, above)."²⁰

SUMMARY

Conflict of interest issues for Ombudsman Programs may be actual or perceived. Some issues are easy to identify and can be prohibited and avoided. In other circumstances, it may be necessary and preferable to identify a remedy for a conflict of interest. As the long-term care system continues to change and more services are provided in the community, Ombudsman Programs are likely to encounter different conflict of interest situations that require a renewed analysis.

Despite the permutations of conflicts of interest or the complexity of a situation, the litmus test for ombudsman programs remains constant. How will this situation or circumstance impact the Ombudsman or the Ombudsman Program's ability to be resident directed and to be viewed by consumers as an uncompromised voice for residents? Ombudsman Programs need clear, definitions, guidelines, policies, and tools for consistently identifying and dealing with conflicts of interest.

¹⁹ 173-14-15 Conflicts of interest. <http://codes.ohio.gov/oac/173-14-15>

²⁰ Georgia. op.cit. Section 404.

APPENDICES

CONFLICT OF INTEREST RESOURCES FOR LONG-TERM CARE OMBUDSMAN PROGRAMS

June 2009

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Letter to Heather L. Adams, Assistant Attorney General, Iowa Department of Justice from William Benson, Acting Principal Deputy, Assistant Secretary for Aging. November 28, 1997. *Organizational Placement of the Iowa Ombudsman Program when the Department licenses and certifies long-term care facilities.*