

Interim Report:

**Committee on Elder Affairs & Long Term  
Care**

January 2000

The Long Term Care Ombudsman Program

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# **An Introduction**

At the request of the Committee, with the approval of the Speaker, staff prepared a research outline and prepared this report to describe the Long Term Care Ombudsman Program in Florida. We considered the follow questions in preparing this study:

- √1. A review of the national studies done on the Long Term Care Ombudsman programs
- √2. Analysis of Florida data from the National Ombudsman Reporting System (NORS) and the required annual report.
- √3. A review of the operational structure and authority of state ombudsman to manage the program.
- √4. A review of descriptive information about the volunteer Ombudsmen.

Considering the Ombudsman program's functionality in this state, in addition to recommendations made by the Institute of Medicine after their Congressionally authorized study of the national Ombudsman programs, staff prepared recommendations to address the following areas of concern:

- 1. Accessibility
- 2. Conflict-of-interest
- 3. Management of Fiscal Resources & Indirect cost allocation
- 4. Management of Volunteers
- 5. Cooperative Agreements with key partners

## **Origins of the word *Ombudsman***

According to the Oxford English Dictionary the English “ombudsman” is derived from the Swedish word,<sup>1</sup> ***ombud***, a commissioner or agent. Further reading provides that ***ombud*** comes from the Old Norse words ***umboð*** meaning charge, commission, and ***umboðsmaðr*** commissary, or manager which means:

...a public official appointed to investigate citizens' complaints against local or national government agencies that may be infringing on the rights of individuals.

In the context of long term care, the Ombudsman program began as a federal demonstration project operated in five states. They were operated under the authority of the U.S. Department of Health, Education & Welfare (HEW), now known as Health & Human Services (HHS) by the office responsible for aging-related programs. In 1973, the projects were formally assigned to the Administration on Aging (AoA) within HHS. In 1978, Congress codified the Ombudsman Program in the Older Americans Act.

## **The Mission of the Long Term Care Ombudsman Program: Federal Law**

Long-Term Care Ombudsmen advocate on behalf of individuals and groups of residents as well as work to affect systems changes on a local, state and national level. They provide an on-going presence in long-term care facilities, monitoring care and conditions and providing a voice for those who are unable to speak for themselves.

Ombudsmen are required to address and attempt to rectify the broader, or underlying, causes of problems for residents of LTC facilities. Policies and other written material from the AoA indicate that when Ombudsmen are working at the *systemic* level, they are to:

- advocate for policy change;
- evaluate laws and regulations;
- provide education to the public and facility staff;
- disseminate program data; and,
- promote the development of citizen organizations and resident and family councils.

Title VII of the Older Americans Act delineates the following responsibilities for Ombudsman:

- identify, investigate and resolve complaints made by or on behalf of residents;
- provide information to residents about long-term care services;
- represent the interests of residents before governmental agencies and seek administrative, legal and other remedies to protect residents;
- analyze, comment on and recommend changes in laws and regulations pertaining to the health, safety, welfare and rights of residents;
- educate and inform consumers and the general public regarding issues and concerns related to long-term care and facilitate public comment on laws, regulations, policies and actions;
- promote the development of citizen organizations to participate in the program; and,
- provide technical support for the development of resident and family councils to protect the well-being and rights of residents.

### **Placement of Ombudsman Programs in State-Level Governments**

All 50 states, the District of Columbia, and Puerto Rico have LTC ombudsman programs. In each locale, the Ombudsman program has been organized slightly differently. According to the federal Administration on Aging, each governmental entity has decided on an organizational placement that is best for its needs and somewhat distinct from what other areas have done.

Forty-two states have placed the Office of the State LTC Ombudsman program within the state unit on aging (SUA). In Florida, the Department of Elder Affairs is the designated SUA and houses the Ombudsman program. In some areas, the Ombudsman programs operate completely outside of the state-level government.

## Definitions of Long Term Care

The federal Administration on Aging defines "Long Term Care (LTC)" as:

... a broad term that describes a constellation of services used by people with disabilities to achieve a meaningful life according to their own expectations and yardsticks. These services include health care, social services, housing, transportation, and other supportive services.

The Florida Commission on Long Term Care defined long term care this way for their work:

Long term care is the provision of services, including health care, personal care, social services, and economic assistance, delivered over a sustained period of time in a variety of settings, ranging from a person's own home to institutional settings, to ensure quality of life for all persons regardless of age.<sup>2</sup>

In the federal Older American's Act, a long term care facility is defined for purposes of the Ombudsman program as:

### Title I            SEC. 102 — DEFINITIONS

(34) The term "long-term care facility" means--

- (A) any skilled nursing facility, as defined in section 1819(a) of the Social Security Act (42 U.S.C. 1395i—3(a));
- (B) any nursing facility, as defined in section 1919(a) of the Social Security Act (42U.S.C. 1396r(a));
- (C) for purposes of sections 307(a)(12) and 712, a board and care facility; and
- (D) any other adult care home similar to a facility or institution described in subparagraphs (A) through (C).

## **Nursing Homes at the End of the Century**

Nearly 70 percent of nursing homes today are for-profit businesses that receive about \$20 billion in Medicare and Medicaid dollars. The federal and state funds pay 60 percent of the bills in nursing homes that accept Medicare and Medicaid patients. In Florida, fewer than twenty nursing facilities do not participate in either program.

## **Nursing Home Reform Law: OBRA 87 -- Protecting Vulnerable Persons**

Reacting to scandals, tragedies, and public outcry, the Congress passed as a part of the Omnibus Budget Reconciliation Act of 1987 stringent federal standards. The passage of the Nursing Home Reform Law of 1987 and publication of regulations to implement that law (known as OBRA 87) in 1990 ushered in a new and more rigorous period of nursing facility regulation.

The law's regulations cover many aspects of resident care and rights, mandate training of nursing home aides, require that nursing homes be inspected every 9 to 15 months, and direct that the state survey report on the results of this inspection be available to the public.

As important as these inspections are, they usually occur annually. As the Administration on Aging describes, this leaves the ombudsmen to provide the only day-to-day source of protection, support, and advocacy for nursing home residents.

## **Roles of Ombudsmen and Regulators**

In contrast to regulators, whose role is to apply laws and regulations, ombudsmen are supposed to help identify and resolve problems on behalf of residents in order to improve their overall well-being. The ombudsman program works alongside other programs, groups, and individuals engaged also in efforts to improve the quality of care and quality of life of residents in LTC facilities.

Although the classic model of the ombudsman stresses neutrality and mediation, the role of the LTC ombudsman is considered a hybrid, since it was designed to encompass both active advocacy and representation of residents' interests over those of other parties involved. Additionally, in the classic model the ombudsman intervenes between the government and individual citizens. In the case of the LTC ombudsman program, however, intervention usually also includes a private third party--the nursing or Board & Care (B&C) facility.

**Chart 1: Nursing Home Capacity in Florida**

<b>Date</b>	<b>Total Nursing Home Beds *</b>	<b>Census as a % of Capacity</b>
<b>January 1996</b>	74,246	90.6%
<b>July 1996</b>	74,935	90.0%
<b>January 1997</b>	75,935	89.4%
<b>July 1997</b>	77,058	89.7%
<b>January 1998</b>	78,139	88.0%
<b>July 1998</b>	78,770	87.9%
<b>January 1999</b>	79,610	86.4%
<b>July 1999</b>	80,169	86.5%

\* total beds includes only community nursing home beds, not acute-care hospitals and "swing beds"

## **Staffing Levels**

Recent estimates of LTC ombudsman staffing put the number of full-time equivalent (FTE) paid staff at about 865. Volunteer ombudsmen, excluding volunteers who serve chiefly on advisory committees, number about 6,750 nationally.

**Chart 2: Florida's Staffing & Volunteer Levels**

Year	FTEs	Volunteers	Total FTEs & Volunteers	Ratio of Staff to NF Beds
1996	17.5	208	225.5	661.56
1997	17.5	226	243.5	628.31
1998	17.5	262	279.5	561.39
1999	17.5	257	274.5	582.07

## Funding

Funding for LTC ombudsman programs is patched together from multiple sources at the federal, state, and local levels. Most federal funding comes through the Older American's Act. In 1965, the Ombudsman programs' budgets totaled \$40.9 million. Approximately, 60 percent of that was federal money. The remaining 40 percent was a mix state and local funds.

**Chart 3: Funding for Florida Ombudsman Program**

Year	OAA \$	% of total budget	General Revenue	% of total budget	other \$	total budget
1995-96	\$720,872	83.4	\$143,000	16.6	\$0	\$863,873
1996-97	\$723,359	83.7	\$141,017	16.3	\$0	\$864,376
1997-98	\$724,095	63.4	\$148,485	13	\$0	\$1,142,288
1998-99	\$945,933	85.6	\$159,634	14.4	\$0	\$1,105,627
1999-2000	\$945,933	78.5	\$259,661	21.5	\$0	\$1,205,654



## Scope of the Long Term Care Ombudsman Program

In 1997, about 880 paid ombudsmen and 6,800 certified volunteer ombudsmen working in more than 590 localities nationwide handled approximately 191,000 complaints made by over 113,000 individuals and provided information to another 200,000 people.

Florida data is summarized in the following chart.

**Chart 4: Florida Data: 1997-1999**

Year	# complaints	# persons on whose behalf complaints were filed	# ombudsman volunteers
1996	5,455	69,000	208
1997	6,635	51,754	226
1998	10,071	76,448	262

\*\*Ombudsman Program FTEs are not involved in investigations and are not counted in this chart.

**Chart 5: National Data from Select States: 1997<sup>3</sup>**

State	# complaints	# persons on whose behalf complaints were filed <sup>^^</sup>	# Ombudsmen	State's Rank by Persons Age 65+	
				#	%
Ca	17,764	13,687	1,283.5	1	46
NY	5,483	4,481	624.9	3	17
Tx	9,495	9,495	801.94	4	48
Pa.	4,641	1,938	98.16	5	2
R.I	686	446	2	41	3
W.Va.	1,043	696	2	34	4
Ia.	254	73	2	29	5

\* Florida is #2 in number of elders and is ranked #1 in % of elders. These are complaints for nursing home residents only.

## **Ombudsmen Spot Problems**

Ombudsmen often detect mood or health changes in residents that are overlooked by busy staff. Kathy Gannoe, director of the ombudsman program in Lexington, Kentucky told researchers from the Institute of Medicine who were studying the Ombudsman program:

*We are an outside eye, so we notice if something is strange. We get to know residents and see changes. The genius of our program is that first, we hire older people, and second, our people live near the nursing homes they visit.*

## **Evaluation of the National Program: Study and Report by the Institute of Medicine (IOM)**

In 1992, the Congress reauthorized the Older American's Act and included a directive to the Assistant Secretary for Aging, that a more in-depth examination of the program was warranted. The Assistant Secretary specifically wanted to clarify the present strengths and weaknesses and assess the program's potential for future contributions.

The Institute of Medicine (IOM), under contract to the Administration on Aging, evaluated and addressed important aspects of the LTC ombudsman program: specifically, the LTC ombudsmen's ability to deal with problems that affect the care provided to, and the quality of life achieved by, elderly residents of LTC facilities.

The IOM's work began in October 1993. To conduct the study, the IOM appointed a 16-member expert committee comprising individuals recognized for their expertise in LTC, medicine, medical sociology, health care policy and research, clinical research, health law, health care administration, state government policy and program administration, consumer advocacy, public health, voluntarism, and the LTC ombudsman program.

The IOM committee collapsed the several statutory functions of the LTC ombudsman program into two primary services for purposes of their report:

1. direct, individual advocacy services, which should be accessible, available, and meet the needs of residents of nursing and B&C facilities; and,
2. systemic advocacy services.

### **Summary of Key Findings & Recommendations in the IOM Report :**

The IOM concluded its evaluation of the national programs with observations and suggestions that fell into eight broad areas:

<b>Lack of Access to Program</b>	<b>Adequate management of volunteers</b>
<b>Lack of program visibility</b>	<b>Management of fiscal resources</b>
<b>Inadequate legal counsel.</b>	<b>Indirect cost allocations</b>
<b>Conflict of interest</b>	<b>Cooperative agreements</b>

The following is a summary of the IOM's key findings, an assessment of the state's Ombudsman program compared to that finding, and any recommendations formulated as a result of this project.

#### **1. Lack of Access to the Ombudsman Program**

The IOM wrote, "Not all residents of LTC facilities in need of advocacy assistance have meaningful access to the services of an ombudsman. Too many states' programs were fragmented and focused primarily on responding to complaints." The IOM committee declared that kind of focus was not in compliance with the *spirit* of the OAA. They said Ombudsman programs should function as a whole, statewide, unified, integrated program. Well done Ombudsman programs were characterized by the delivery of a range of individual, systemic, and educational efforts in addition to specific complaint resolution work.

## 2. Lack of program visibility

The IOM cited a lack of a frequent visitation to nursing facilities and little, if any, evidence that other methods are used effectively to build an awareness of the availability of ombudsman services.

The number and speed with which complaints are investigated and resolved is one measure of the Ombudsman's presence in long term care facilities.

### *Florida's Status: Items 1 & 2*

- A. State policy and procedures require the Ombudsmen to visit the resident at the beginning of an investigation. Statutory language directing the State Ombudsman to ensure that every resident is visited when a complaint is received would be a clear expression of Legislative intent and would tie a clear performance measure to the budgeting process.

#### **Florida Ombudsman Program Activities**

year	# complaints	# on-site investigations	% on-site investigations	# volunteers
1996	5,455	5,455	100	208
1997	6,635	6,635	100	226
1998	10,071	10,071	100	262

- B. Toll Free Number: The toll-free telephone number for the state Ombudsman is required to be posted in every licensed nursing facility in the state. House Bill 1971 (Chapter 99-394, L.O.F.) passed in the 1999 Legislative session, directed the Agency for Health Care Administration (AHCA) to prepare a poster with the phone numbers and some descriptive information about each of the agencies or programs available to assist residents of long term care facilities. AHCA provided a copy of the final poster to the Committee and reported that a copy has been provided to all of the nursing facilities. Since the law took effect on October 1, 1999, there have been 1,626 calls to the new Hotline.

### **Recommendation**

*The Ombudsman program should continue working to increase awareness among residents, families, and concerned persons in the community of the Ombudsman program, of resident's rights and of the availability of local Ombudsman volunteers to assist residents and their families. Special attention needs to be paid to the needs of residents with cognitive impairments, non-English speakers, or residents with handicapping conditions that would limit a resident's capacity to contact the Ombudsman.*

### **3. Inadequate independent legal counsel.**

The State Units on Aging, generally, have not ensured that adequate and independent legal counsel is consistently available to the ombudsman programs for the purpose of providing advice and counsel related to LTC residents.

#### ***Florida's Status: Item #3***

*The Florida program has always employed a full-time attorney for the benefit of the program. This has assured freedom from conflict-of-interest for program staff and volunteers who seek legal assistance and counsel.*

### **4. Conflict of Interest**

The IOM report noted that conflict of interest is a critical area to which Ombudsman and policy makers must be continually attentive. The IOM committee in their report wrote about conflict-of-interest:

Ombudsmen--particularly state ombudsmen--operate in a politically charged environment accentuated by the fact that most often the state ombudsman is a state employee. Government cannot function efficiently if its employees work in opposing directions. By federal statute, the ombudsman is required to speak out against government laws, regulations, policies, and actions when the circumstances justify such action. The imposition of a state's routine chain-of-command rules on the ombudsman can significantly constrain his or her independence, although no person in such situations may intentionally act to interfere with the work of the ombudsman.

### **IOM's Recommendations on Conflicts of Interest**

1. ... no ombudsman program should be located in an entity of government (state or local) or agency outside government whose head is responsible for: licensure, certification, registration, or accreditation of long-term care residential facilities; provision of long-term care services, including Medicaid waiver programs; long-term care case management; reimbursement rate setting for long-term care services; adult protective services; Medicaid eligibility determination; preadmission screening for long-term care residential placements; or decisions regarding admission of elderly individuals to residential facilities.

Were this change made by Congress, Florida's Ombudsman program could not be housed in the Departments of Elder Affairs or Children & Family Services. The Agency for Health Care Administration would also be disqualified.

During the 1997 Legislative Session, there was discussion about the value and feasibility of moving the Ombudsman program from the Department of Elder Affairs (DOEA) to the Department of Legal Services, Office of the Attorney General. Ultimately, the decision was to continue to house the Ombudsman program in DOEA. Section 430.0063(1), F.S., provides that the Ombudsman "shall be located for administrative purposes in the Department of Elderly Affairs." The statute, however, continues by providing authority for DOEA to assist the Ombudsman by: **developing procedures** to investigate reports and determine if abuse or neglect exists in a facility; and, to **develop procedures** relating to the receipt and resolution of such complaints. Further, DOEA is granted **authority to promulgate a rule** to ensure that no officer, employee or representative of the Ombudsman program nor any member of the immediate family of such officer, employee, or representative, may have a conflict of interest.

#### Appointments to the State and District Councils

The State Long-Term Care Ombudsman Council is composed of a member from DOEA's eleven Planning & Service Areas (PSAs) and one additional member from PSA sub-district 3b. that are the DOEA local offices plus three appointed by the Governor

The Governor's appointments shall be made from a list of not fewer than eight nominees, to be selected by the secretary in consultation with the State Long-Term Care Ombudsman Council. If the appointments are not made within 30 days after the Governor receives the list of nominees, the secretary shall, in consultation with the State Long-Term

Care Ombudsman Council, appoint three members from the list of nominees submitted to the Governor. At least one member appointed by the Governor must be over 60 years of age. Members serve 3-year terms, and there are no term limits.

The District level ombudsman councils are encouraged to recruit council members who are 60 years of age or older. Like the state Council, district members serve 3-year terms, and there are no limits upon the number of terms a person may serve. When a term expires, or in another vacancy, the council is authorized to appoint a replacement by majority vote of the council, subject to the approval of the Governor. If no action is taken by the Governor to approve or disapprove the replacement of a member within 30 days after the council has notified the Governor of the appointment, the appointment of the replacement shall be considered approved.

**Recommendation:**

*The Committee should consider revising the language in chapter 400, Part I which describes the role of DOEA in relation to the work and autonomy of the Ombudsman program. Similar language is in the statutes describing the relationship between the Statewide Human Rights Advocacy Committee and the state agency in which it is housed.*

*Devolving appointment authority to the Secretary of the Department of Elder Affairs, in cases when the Governor does not act promptly, seems to be counter to the spirit, if not the letter of the Older American's Act direction that the Ombudsman program not be subject to the authority of the executive agency which provides case management, nursing home pre-admission screening, or waiver programs. The Committee may want to consider revising the appointment process and excluding the DOEA Secretary from having appointment authority.*

**5. Adequate Management of Volunteers**

The IOM committee suggested that the ratio of staff to volunteers be in the range of 1 paid full-time equivalent manager for every 20 to 40 volunteers.

***Florida's Status: Item #5***

Florida's staff to volunteer ratio is 1 staff to 17 volunteers.

**Recommendation:**

*The Ombudsman should ensure that budget requests allow for travel reimbursement to volunteers for investigative activities and for attending training and other development workshops.*

**6. Management of Fiscal Resources**

The IOM committee recommended that state ombudsman offices have unrestricted knowledge of their own budgets and, within the boundaries permitted by state budget policy and procedures and required by federal mandates for compliance, decision making-authority among line-item expenditures. The IOM report said: "Host agencies should exercise prudent judgment regarding the use of ombudsman service monies to support administrative costs."

***Florida's Status: Item # 6***

430.0067, F.S. provides:

(6) The Department of Elderly Affairs shall make a separate and distinct request for an appropriation for all expenses for the state and district ombudsman councils.

DOEA reviews, revises, and edits the Legislative Budget requests prepared by the State Ombudsman. DOEA has, in some cases, elected not to forward certain budget requests.

**Recommendation**

*The Committee should consider revising the language in chapter 400, Part I which describes the role of DOEA in relation to Ombudsman program for fiscal and budget matters. Similar language is in the statutes describing the relationship between the Statewide Human Rights Advocacy Committee and the state agency in which it is housed.*

**7. Indirect Cost Allocations**

The IOM committee became concerned about the possibility that some host agencies may be assessing administrative charges against the ombudsman program budget to such a degree that the ability of the ombudsman and designated representatives to deliver services is severely affected. The IOM study recommended that Congress direct the Office of the Inspector General, in the U.S. Department of Health and Human Services, to audit the states' expenditure



practices to determine how much of program funds are being diverted for administration and indirect costs.

***Florida's Status: Item #7***

The Department of Elder Affairs' federally approved indirect cost allocation is 30%. The department charges the Ombudsman a total of approximately \$204,000 in indirect costs. This is approximately sixteen per cent of the Ombudsman's \$1.28 million total budget.

**Recommendation:**

*The Committee should consider if an audit conducted by the Auditor General would be a prudent action to take before any federal audit takes place. The Auditor General could be asked to review the current indirect cost allocations, compare it to comparable programs "administratively housed" in an executive branch agency, and comment on the propriety and value of the share of money allocated for this purpose.*

**8. Cooperative agreements**

The IOM recommended that each Ombudsman Program prepare cooperative agreements with the Legal Services Corporation, the National Association of Protection and Advocacy Systems, the National Association of Medicaid Fraud Control Units, and the Office of the Inspector General of the Department of Health and Human Services to foster and encourage a variety of legal assistance resources for residents of long-term care facilities.

***Florida's Status: Item #8***

The State Ombudsman program has executed cooperative agreements with the Legal Services Corporation, the Advocacy Center for Persons with Disabilities, Inc., the office of the Inspector General. The State Ombudsman works closely and cooperatively with the State's Medicaid Fraud Unit in the Office of the Attorney General.

**Recommendation:**

*The Ombudsman should consider developing a written cooperative agreement with the Medicaid Fraud Unit.*

## Appendix I

### State Long-Term Care Ombudsman Provisions in the Older Americans Act as Amended in 1992 (42 U.S.C. 3058f)

#### Title I

##### SEC. 102 — DEFINITIONS

(34) The term “long-term care facility” means--

- (A) any skilled nursing facility, as defined in section 1819(a) of the Social Security Act (42 U.S.C. 1395i—3(a));
- (B) any nursing facility, as defined in section 1919(a) of the Social Security Act (42 U.S.C. 1396r(a));
- (C) for purposes of sections 307(a)(12) and 712, a board and care facility; and
- (D) any other adult care home similar to a facility or institution described in subparagraphs (A) through (C).

#### Summary of Provisions in Titles II and III:

SEC. 201(d) establishes in the Administration the Office of the Long-Term Care Ombudsman Programs headed by an “Associate Commissioner” and describes the criteria for designation, line of reporting, protections against conflict of interest and functions of the “Associate Commissioner.”

SEC. 202(a)(21) requires the Assistant Secretary of Aging to establish and operate the National Ombudsman Resource Center by grant or contract, outlines the functions of the Center and specifies that resources made available to the Center shall not be less than the amount of resources provided to the Center for fiscal year 1990.

SEC. 207(b) requires the Assistant Secretary to compile an annual report to specified congressional committees and others summarizing and analyzing the data collected by state ombudsman programs, identifying significant problems and issues revealed by such data, discussing current issues concerning the state long-term care ombudsman programs, and making recommendations regarding legislation and administrative actions to resolve such problems.

SEC. 301(c) requires the Assistant Secretary to provide technical assistance and training to state long-term care ombudsman programs and to representatives of ombudsman programs.

SEC. 304(d)(1) specifies that from any State’s allotment of Title III, part B social services funds, after state and area agency plan administration funding is taken off, “such amount...as the State agency state agencies on aging determines to be adequate for conducting an effective ombudsman program under section 307(a)(12) shall be available for conducting such program.”

SEC. 306(a)(11) requires area agencies on aging to provide assurances in their area plan that they will expend from Title III funds no less than they expended in FY 1991 in carrying out the Long-Term Care Ombudsman Program.

SEC. 307(a)(21) requires State agencies on aging to provide assurances in the State plan that the State agency will carry out through the Office of the State Long-Term Care Ombudsman a State Long-Term Care Ombudsman program.

SEC. 307(a)(12) requires the “State agency, in carrying out the State Long-Term Care Ombudsman Program...will expend not less than the total amount expended by the agency in fiscal year 1991 in carrying out such a program....”

## **Title VII**

Summary of pertinent provisions in Sections 702-705:

SEC. 702 provides for separate authorization of funds for the programs in Title VII.

SEC. 703 establishes a Title VII ombudsman minimum funding requirement, with FY 1991 as the base year.

SEC. 705(a)(2) requires the states to have an assurance in their State plan that they will hold public hearings and use other means to obtain the views of older individuals, area agencies on aging, recipients of grants under Title VI of the Act (services for Native Americans) and other interested persons and entities regarding programs carried out under this subtitle.

SEC. 705(a)(4) requires an assurance in the State plan that “the State will use funds made available under this subtitle for a chapter in addition to, and will not supplant, any funds that are expended under any Federal or State law in existence on the day before the date of the enactment of this subtitle, to carry out the... activities described in the chapter.”

SEC. 711 defines terms in Section 712, including:

(5) REPRESENTATIVE.-- The term “representative” (of the Office of the State Long-Term Care Ombudsman) 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.

The following section describing the Long-Term Care Ombudsman Program is provided in its entirety from the Act.

**SEC.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(a), 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 full-time 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 Commissioner 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--
- (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;
  - (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 Commissioner; 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 Commissioner, 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);
- (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 Associate Commissioner for Ombudsman Programs, in consultation with representatives of citizen groups, long-term care providers, and the Office, that--
  - (i) specify a minimum number of hours of initial training;
  - (ii) 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
  - (iii) specify an annual number of hours of in-service training for all designated representatives; and
- (B) require implementation of the procedures not later than 21 months after the date of the enactment of this title;
- (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--
  - (A) part A of the Developmental Disabilities Assistance and Bill of Rights Act (42 U.S.C. 6001 et seq.); 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; and
- (8) 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 Commissioner) 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)

### **Sec. 713**

#### **SEC. 713. REGULATIONS.**

The Commissioner 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).



## END NOTES

1. Ombudsman: From the Oxford English Dictionary:  
[Swedish, from *ombud*, a commissioner, agent, which itself comes from Old Norse *umboð* charge, commission, *umboðsmaðr* commissary, manager.

An official appointed to investigate complaints by individuals against maladministration by public authorities; spec. in U.K., the Parliamentary Commissioner for Administration. (Corresp. to Sweden's *justitieombudsmannen*.)

In Sweden, an ombudsman is a deputy of a group, particularly a trade union or a business concern, appointed to handle the legal affairs of the group and protect its interests generally. With the definite suffix *-en* it normally denotes a particular office. The office of *justitieombudsmannen* (abbrev. *JO*), which was instituted in Sweden in 1809, is the one which is referred to in the following quotations, and it is this office which was established in New Zealand in 1962. In Sweden the office of *militieombudsmannen* (abbrev. *MO*) was also introduced in 1809 as a parliamentary commissioner appointed to supervise and enforce the observance of laws and statutes concerned with national defence. In 1968 the offices of *justitieombudsmannen* and *militieombudsmannen* were replaced by four independent officers under the joint name of *justitieombudsmännen*. The word *pressombudsman* connotes a public relations officer, and in its definite form *pressombudsmannen* an office instituted in 1969 to supervise and enforce ethical standards of the press. The office of ombudsman was introduced in Finland in 1919, in Denmark in 1954, and in Norway in 1962.

From: Internet, Word Wizard on April 29, 1998

The U. S. Administration on Aging provides this advisory: the term "ombudsmen" carries no meaning with respect to the gender of the occupant of the position. In the United States, the vast majority of long-term care ombudsmen are women.

2. In this report "nursing facility," the technical term for a Medicaid-certified nursing facility, is used more broadly to describe any nursing home--whether or not it is Medicaid-certified, Medicare-certified, or private-pay.
3. U.S. Department of Health & Human Services: Administration on Aging

<b>State</b>	<b>Population</b>
California	3,571,964
Florida	2,708,804
Texas	1,959,365
Pennsylvania	1,904,822
Ohio	1,494,482

*Top Five States with Elders as Per Cent of Population*

<b>State</b>	<b>Elders (65+) as % of Total Population</b>
Florida	18.5%
Pennsylvania	15.8%
Rhode Island	15.8%
West Virginia	15.1%
Iowa	15.0%
Texas	10.1%
California	11.1%
Ohio	13.4%