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AN ACT

RELATING TO HUMAN RIGHTS; AMENDING SECTIONS OF THE LONG-TERM CARE OMBUDSMAN ACT TO ESTABLISH LIMITATIONS ON REFERRAL IN CASES OF ABUSE, NEGLECT OR EXPLOITATION OF PERSONS RESIDING IN LONG-TERM CARE FACILITIES; REMOVING THE REQUIREMENT FOR THIRD-PARTY WITNESSING WHEN RESIDENTS OF LONG-TERM CARE FACILITIES ORALLY CONSENT TO RELEASE OF MEDICAL, PERSONAL, FINANCIAL AND OTHER NONMEDICAL RECORDS FOR OFFICE OF THE STATE LONG-TERM CARE OMBUDSMAN INVESTIGATIONS.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

SECTION 1. Section 28-17-1 NMSA 1978 (being Laws 1989, Chapter 208, Section 1) is amended to read:

"28-17-1. SHORT TITLE.--Chapter 28, Article 17 NMSA 1978 may be cited as the "Long-Term Care Ombudsman Act"."

SECTION 2. Section 28-17-3 NMSA 1978 (being Laws 1989, Chapter 208, Section 3, as amended) is amended to read:

"28-17-3. DEFINITIONS.--As used in the Long-Term Care Ombudsman Act:

A. "adult protective services" means the agency's adult protective services division that receives and investigates reports of adult abuse, neglect or exploitation;

B. "agency" means the aging and long-term services department;

C. "care" means assistance with the activities of

1 daily living, including eating, dressing, oral hygiene,
2 bathing, mobility, toileting, grooming, taking medications,
3 transferring from a bed or chair and walking;

4 D. "director" means the secretary of aging and
5 long-term services;

6 E. "informed consent" means an agreement by a
7 resident or a resident's surrogate decision-maker to allow a
8 disclosure of information, made with full knowledge of the
9 risks involved and the available alternatives, that is made in
10 writing or through the use of auxiliary aids and services or
11 communicated by a resident or a resident's surrogate
12 decision-maker orally, visually or through the use of
13 auxiliary aids and services and such consent is documented
14 contemporaneously by a representative of the office;

15 F. "licensing and certification" means the
16 licensing and certification bureau of the department of
17 health;

18 G. "long-term care facility" means any residential
19 facility that provides care to one or more persons unrelated
20 to the owner or operator of the facility, including:

21 (1) a skilled nursing facility;

22 (2) an intermediate care nursing facility,
23 including an intermediate care facility for the intellectually
24 disabled;

25 (3) a nursing facility;

- 1 (4) an adult residential shelter care home;
2 (5) a boarding home;
3 (6) any other adult care home or adult
4 residential care facility;
5 (7) a continuing care community;
6 (8) any swing bed in an acute care facility
7 or extended care facility; and
8 (9) any adult daycare facility;

9 H. "office" means the office of the state
10 long-term care ombudsman;

11 I. "Older Americans Act" means the federal Older
12 Americans Act of 1965;

13 J. "ombudsman" means an employee or volunteer of
14 the office who is trained and certified to act as a
15 representative of the office;

16 K. "ombudsman coordinator" means the coordinator
17 of a regional or local ombudsman program designated by the
18 office;

19 L. "program" means the New Mexico long-term care
20 ombudsman program;

21 M. "resident" means any patient, client or person
22 residing in and receiving care in a long-term care facility;

23 N. "state ombudsman" means the individual who
24 heads the office and supervises the ombudsmen; and

25 O. "surrogate decision-maker" means any of the

1 following:

2 (1) an individual chosen by a resident to
3 act on the resident's behalf to support the resident in
4 decision-making; accessing medical, social or other personal
5 information of the resident; managing financial matters; or
6 receiving notifications;

7 (2) an individual authorized by state or
8 federal law, including an agent pursuant to a power of
9 attorney, a representative payee or other fiduciary of the
10 resident, to act on behalf of a resident to support the
11 resident in decision-making; accessing medical, social or
12 other personal information of the resident; managing financial
13 matters; or receiving notifications;

14 (3) a resident's legal representative; or

15 (4) the court-appointed guardian or
16 conservator of a resident."

17 SECTION 3. Section 28-17-9 NMSA 1978 (being Laws 1989,
18 Chapter 208, Section 9, as amended) is amended to read:

19 "28-17-9. REFERRALS.--

20 A. When abuse, neglect or exploitation of a
21 resident of a long-term care facility is witnessed or
22 suspected, the state ombudsman or an ombudsman shall
23 personally discuss the matter with the resident, or, if the
24 resident is unable to communicate informed consent, the
25 resident's surrogate decision-maker, if applicable, and:

1 (1) if the resident communicates informed
2 consent to referral and disclosure of identifying information
3 to the long-term care facility, law enforcement or one or more
4 of the entities listed in Subsection B of this section, the
5 state ombudsman or an ombudsman shall assist the resident in
6 reporting the allegation, or the state ombudsman or an
7 ombudsman shall make the report directly. The method of
8 reporting is at the sole discretion of the resident, though
9 the state ombudsman or an ombudsman may counsel the resident
10 regarding the method of reporting. If the resident is capable
11 of informed consent and chooses not to refer the matter and
12 not to disclose identifying information, the state ombudsman
13 or an ombudsman shall not make a referral or disclose this
14 information;

15 (2) if the state ombudsman or an ombudsman
16 determines that the resident is not able to communicate
17 informed consent, the state ombudsman or the ombudsman shall
18 consult with the resident's surrogate decision-maker, if any.
19 If the surrogate decision-maker chooses to make a referral and
20 disclose relevant identifying information with respect to the
21 resident, the state ombudsman or an ombudsman shall assist the
22 surrogate decision-maker in reporting the allegation or the
23 state ombudsman or an ombudsman shall make the report
24 directly. The method of reporting is at the sole discretion
25 of the resident's surrogate decision-maker, though the state

1 ombudsman or an ombudsman may counsel the surrogate
2 decision-maker regarding the method of reporting. If the
3 surrogate decision-maker chooses not to refer the matter and
4 not to disclose identifying information, the state ombudsman
5 or an ombudsman shall not make a referral or disclose this
6 information unless the state ombudsman or the ombudsman has
7 reasonable cause to believe that the surrogate decision-maker
8 has taken an action, failed to act or made a decision that may
9 adversely affect the health, safety, welfare or rights of the
10 resident, in which case, the state ombudsman or the ombudsman
11 shall follow the procedure established in Paragraph (3) of
12 this subsection as if the resident did not have a surrogate
13 decision-maker; or

14 (3) if the state ombudsman or an ombudsman
15 determines that the resident is not able to communicate
16 informed consent and does not have a surrogate decision-maker,
17 an ombudsman, with the consent of the state ombudsman, may
18 make a referral and disclose relevant identifying information
19 about the resident if the state ombudsman or the ombudsman has
20 reasonable cause to believe that it is in the best interest of
21 the resident to make a referral and has no evidence indicating
22 that the resident would not want a referral to be made. In
23 the event that these conditions are met and the abuse, neglect
24 or exploitation has been personally witnessed by the state
25 ombudsman or an ombudsman, the state ombudsman or the

1 ombudsman shall make the report and the disclosure directly to
2 the long-term care facility, law enforcement or the entities
3 set forth in Subsection B of this section.

4 B. The following state agencies or boards shall
5 endeavor to give priority to any complaint referred to them by
6 the office:

7 (1) the facilities management division of
8 the general services department;

9 (2) licensing and certification;

10 (3) adult protective services;

11 (4) the New Mexico medical board;

12 (5) the board of nursing;

13 (6) the board of nursing home
14 administrators;

15 (7) the board of pharmacy;

16 (8) the office of the attorney general; and

17 (9) the medical assistance division of the
18 human services department.

19 C. Any state agency or board that responds to a
20 complaint against a long-term care facility or licensed
21 individual that was referred to the agency by the office shall
22 forward to the office copies of related inspection reports and
23 plans of correction and notice of any citations or sanctions
24 levied against the long-term care facility or the licensed
25 individual."

1 SECTION 4. Section 28-17-13 NMSA 1978 (being
2 Laws 1989, Chapter 208, Section 13, as amended) is amended to
3 read:

4 "28-17-13. ACCESS TO RECORDS OF PATIENTS, RESIDENTS OR
5 CLIENTS.--

6 A. In order for the office to carry out its
7 responsibilities, including conducting investigations, under
8 the Long-Term Care Ombudsman Act, the office shall have full
9 and immediate access to readily available medical, personal,
10 financial and other nonmedical records, which include
11 administrative records, policies, procedures or documents that
12 concern, involve or pertain to a resident's diet, comfort,
13 health, safety or welfare, but do not include internal quality
14 assurance and risk management reports, of a patient, resident
15 or client of a long-term care facility that are retained by
16 the facility or the facility's parent corporation or owner.
17 If the records are not readily available, they are to be
18 provided to the office within twenty-four hours of the
19 request. If the patient, resident or client:

20 (1) has the ability to consent in writing,
21 access may only be obtained by the written consent of the
22 patient, resident or client;

23 (2) is unable to consent in writing, oral
24 consent may be given;

25 (3) has a legally appointed surrogate

1 decision-maker authorized to approve review of records, the
2 office shall obtain the permission of the surrogate
3 decision-maker for review of the records, unless any of the
4 following apply:

5 (a) the existence of the surrogate
6 decision-maker is unknown to the office or the facility;

7 (b) the surrogate decision-maker cannot
8 be reached within five working days;

9 (c) access to the records is necessary
10 to investigate or evaluate a complaint; or

11 (d) the surrogate decision-maker
12 refuses to give the permission and a representative of the
13 office has reasonable cause to believe that the surrogate
14 decision-maker is not following the wishes of the resident;
15 and

16 (4) is unable to express written or oral
17 consent and there is no surrogate decision-maker or the
18 notification of the surrogate decision-maker is not applicable
19 for reasons set forth in Paragraph (3) of this subsection or
20 the patient, resident or client is deceased, inspection of
21 records may be made by employees of the office, ombudsman
22 coordinators and by ombudsmen approved by the ombudsman
23 coordinator or the state ombudsman.

24 B. Copies of records may be reproduced by the
25 office. If investigation of records is sought pursuant to

1 this section, the ombudsman shall upon request produce a
2 statement signed by the ombudsman coordinator or state
3 ombudsman authorizing the ombudsman to review the records.
4 Facilities providing copies of records pursuant to this
5 section may charge the office for the actual copying cost for
6 each page copied.

7 C. Upon request by the office, a long-term care
8 facility shall provide to the office the name, address and
9 telephone number of the guardian, conservator,
10 attorney-in-fact, legal representative or next-of-kin of any
11 patient, resident or client and a copy of any document
12 granting legal decision-making power over a resident.

13 D. The long-term care facility and personnel who
14 disclose records pursuant to this section shall not be liable
15 for the disclosure.

16 E. In order to carry out its responsibilities as a
17 health oversight agency, the office shall establish procedures
18 to protect the confidentiality of records obtained pursuant to
19 this section and in accordance with the federal Health
20 Insurance Portability and Accountability Act of 1996
21 regulations." _____