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FISCAL IMPACT REPORT

SPONSOR: Park DATE TYPED: 03/12/03 HB 769/aHCPAC
 SHORT TITLE: Long-Term Care Ombudsman Access to Records SB _____
 ANALYST: Hayes

APPROPRIATION

Appropriation Contained		Estimated Additional Impact		Recurring or Non-Rec	Fund Affected
FY03	FY04	FY03	FY04		
	NFI				

(Parenthesis () Indicate Expenditure Decreases)

Duplicates SB 663

SOURCES OF INFORMATION

Responses Received From

Department of Health (DOH)
 State Agency on Aging
 Human Services Department (DOH)
 Attorney General's Office (AGO)

SUMMARY

Synopsis of HCPAC Amendments

The House Consumer and Public Affairs Committee changed the first two sentences in subsection A with five separate amendments. Combining them together, subsection A beginning on line 19 now reads:

A. In order for the office to carry out its responsibilities, including conducting investigations, under the Long-Term Care Ombudsman Act, the office shall have full and immediate access to readily available medical, personal, financial and other nonmedical records which include administrative records, policies, procedures or documents that concern, involve or pertain to a resident's diet, comfort, health, safety or welfare, but do not include internal quality assurance and risk management reports, of a patient, resident or client of a long-term care facility that are retained by the facility or the facility's parent corporation or owner. If the records are not read-

ily available, they are to be provided to the office within twenty-four hours of the request.

Amendment #7 deletes subsection B on page 3; however, the language in subsection B is now incorporated into revised subsection A quoted above.

Amendments #9 and #10 supplement existing language in subsection F beginning on page 3 so that it now reads in the following manner: In order to carry out its responsibilities as a health oversight agency, the office shall establish procedures to protect the confidentiality of records obtained pursuant to this section and in accordance with the federal Health Insurance Portability and Accountability Act of 1996 regulations.

The two remaining amendments not detailed in this analysis are of a technical nature.

Synopsis of Original Bill

Section 1. House Bill 769 amends Section 28-17-13 NMSA 1978 of the Long-Term Care Ombudsman Act to clarify the Ombudsman's authority to access medical, personal, financial and other non-medical records of a patient/resident/client while carrying out its responsibilities, including conducting investigations. Sub-section B additionally states that the office shall have full and immediate access to any administrative records, policies, procedures or documents that concern, involve or pertain to a resident's diet, comfort, health, safety or welfare.

Section 2. House Bill 769 also amends Section 28-17-14 NMSA 1978 regarding confidentiality of information to read that "All state ombudsman files and records pertaining to clients, patients and resident are confidential and not subject to the provisions of the Inspection of Public Records Act."

Significant Issues

1. The Ombudsman Program is an advocacy program currently consisting of eight staff and 118 volunteers. The staff and volunteers must complete a three-day training which includes conducting complaint investigations, how to identify and investigate abuse and neglect, residents' rights, long-term care rules and regulations, and ethics of advocacy. The volunteers are required to visit their assigned facilities a minimum of three hours each week and conduct unannounced visits. On many occasions, staff and volunteers have noticed skin tears, bruising or a decline in functional abilities in residents that facility staff are unable to explain. Immediate access to records will significantly improve the investigations, response time and case resolution.
2. When investigating complaints in long-term care facilities, the Ombudsman Program is part of a larger investigatory group referred to as the "Joint Protocol." The Joint Protocol includes the Department of Health Licensing and Certification Bureau, the Children, Youth and Families Adult Protective Services, the Human Services Department and the AG's Medicaid Fraud Control Unit. Of these agencies, the Ombudsman Program is the only member who has the statutory authority for unrestricted 24-hour access to residents. Therefore the volunteers often witness quality of care issues that the other agencies may not routinely witness, such as staff shortages or residents who are not fed, changed or bathed. By the time these complaints are investigated by the other members, conditions may have changed in the facility. According to the State Agency on Aging, some agen-

cies have even refused to accept the Ombudsman referral unless substantiated evidence is collected first. This is difficult with the lack of clarity in the current statute regarding access to records. Clear authority to access records as granted in HB 769 reinforces the Ombudsman's federal authority to investigate complaints and will assist residents to resolve issues and receive the care they need in a timely manner.

3. The Long-Term Care (LTC) Ombudsman has current state and federal authority to conduct investigations and access records, as well as an obligation to protect the confidentiality of information obtained concerning individual residents. HB 769 updates the Long-Term Care Ombudsman Act to better reflect Title VII of the Older American's Act, as amended in 2000, regarding investigations and access to records. Furthermore, the Older American's Act gives the LTC Ombudsman the authority not only to investigate complaints but to initiate investigations based on its observations of the conditions in the facility.
4. Federal and state statutes also mandate that the Ombudsman maintain confidentiality of the resident and the complainant, with few exceptions. With abuse and neglect seemingly on the rise in long-term care facilities, the Ombudsman Program has experienced an unprecedented number of requests and subpoenas for records from attorneys interested in pursuing or defending cases. Clarification that the records of the state Ombudsman regarding individuals are confidential, not public records, will limit the number of requests and assist the program in maintaining confidentiality.
5. According to the Department of Health, these changes could shift the role of Ombudsman from a positive role for assisting and supporting long-term care facility residents and providers in the resolution of concerns and issues to an adversarial role that would render the Ombudsman ineffective as a positive support to quality of life for nursing home residents. DOH also expresses concern the HB 769 may not comply with HIPAA regulations. However, under the HIPAA Privacy Rule, the LTC Ombudsman Program qualifies as a "health oversight agency" and, therefore, covered entities may release individually identifiable information to the Ombudsman for use in oversight activities authorized by law, per Sections 164.501 and 164.512(d) of the Privacy Rule.

ADMINISTRATIVE IMPLICATIONS

HB 769 clarifies the Ombudsman's authority to access records to investigate complaints, as well as the confidential nature of individual resident records. These clarifications will make it easier to conduct investigations in a timely manner without having debates with facilities or taking legal action to force a facility to release records. Clarifying that individual records are not public and are not subject to provisions of the Inspection of Public Records Act will also save legal time and expense that has been necessary in the past to protect such records from discovery without the resident's/representative's permission or a court order.

DUPLICATION

SB 663 duplicates this bill.

OTHER SUBSTANTIVE ISSUES

DOH states that it is wary about releasing resident administrative and financial data to individuals who may or may not have the proper training, knowledge or experience to assess and use patient records appropriately. DOH's concern regarding confidentiality seems legitimate given the example provided in the department's analysis of a volunteer misusing resident information and breaching confidentiality on various occasions. This issue may be the crucial point for enacting HB 769—ensuring that volunteers in the Ombudsman Program are well-trained and clearly understand their authority and their limits when reviewing confidential information.

POSSIBLE QUESTIONS

1. What are the sanctions if a patient's confidential information is improperly breached?

CMH/yr