



Appendices

The following pages include resource information, sample forms, copies of relevant laws and other information for reference and use by New York State Long Term Care Ombudsmen.

Throughout the manual, resource icons identify references within the body of the training material with corresponding resource information found in the Appendix.

TABLE OF CONTENTS

Long Term Care Ombudsman Post-Test	3
Resources	5
Agencies	5
County Ombudsman Contact Table	13
Forms	17
Ombudsman Case Form	17
Record Access Authorization Form	21
Laws	23
NYS Long Term Care Ombudsman Program Laws	23
A Note on Recent NYS Law Changes	23
Conversion Chart for Article 19-J to the Elder law	23
LTCOP Provisions in the OAA, Amended 2000	25
AOA-IM-03-01, Selected Provisions of the Privacy Rule	40
New York State Consolidated Laws	46
Chapter 18. Executive Law	46
Chapter 27. Mental Hygiene Law	50
Chapter 45. Public Health Law	73
Chapter 55. Social Services Law	77
S.7748 – Assisted Living Reform Act	80
Title 9 Executive Law	90
Title 10 Department of Health	92
Title 18 Department of Social Services	107
Olmstead Decision	129
Additional Legal Resources	132





Long Term Care Ombudsman Post-Test

The following statements are either true or false. Please indicate T/F for each statement.

- _____ 1. Medicaid only covers people under the age of 65.
- _____ 2. The most common problem in old age is depression.
- _____ 3. An ombudsman can be best described as a friendly visitor.
- _____ 4. An adult care home and nursing home provide the same type of care but are different in size.
- _____ 5. Nursing homes are regulated and licensed by the N.Y. State Department of Health.
- _____ 6. A certified ombudsman should feel free to tell the administrator to make a change in policy or procedure that is not working well
- _____ 7. The only reason a nursing home can transfer a patient is if that patient switches to Medicaid as a source of payment.
- _____ 8. Doctors ultimately have the final word in what medications the patient will or will not receive.
- _____ 9. An ombudsman should believe everything a resident tells him/her. It is a key element in building trust.
- _____ 10. Ombudsmen are not allowed to do any "hands on" care.
- _____ 11. A long term care ombudsman has the legal right to visit their assigned facility any time of the day.

- _____ 12. Ombudsmen are not expected to visit with comatose patients or Alzheimer's patients because communication with these people is often futile.
- _____ 13. Residents fear retaliation should they file a complaint with the ombudsman.
- _____ 14. The adult care home may not transfer a resident should that resident develop a need for regular nursing care. The service should be contracted to come into the home.
- _____ 15. Residents of both nursing homes and adult care homes lose many of their rights once they are institutionalized.





Agency Resources

Administration on Aging (AOA)

Washington, DC 20201

Tel: 202 619-0724

Fax: 202 357-3555

Email: AOAinfo@AOA.gov

Web: <http://www.aoa.gov/>

Adult Homes

Web: <http://www.health.state.ny.us/nysdoh/acf/map.htm>

American Health Care Association (AHCA)

1201 L Street, NW

Washington, DC 20005

Tel: 202 842-4444

Fax: 202 842-3860

Email: webmaster@ahca.org

Web: <http://www.ahca.org/>

Assisted Living Federation of America (ALFA)

11200 Waples Mill Road, Suite 150

Fairfax, VA 22030

Tel: 703 691-8100

Fax: 703 691-8106

Email: info@alfa.org

Web: <http://www.alfa.org/>

CarePlans.com

Web: <http://www.careplans.com>

Centers for Medicare & Medicaid Services (CMS)

7500 Security Boulevard

Baltimore, MD 21244-1850

Tel: 877 267-2323

Web: <http://www.cms.hhs.gov/>

The Council for Disability Rights

205 West Randolph, Suite 1645

Chicago, IL 60606

Tel: 312 444-9484

Fax: 312 444-1977

Web: <http://www.disabilityrights.org/>

Durable Medical Equipment Regional Carrier (DMERC) for Region A

HealthNow New York Inc., DMERC A

P.O. Box 6800

Wilkes-Barre, PA 18773-6800

Tel: 866 419-9458

Web: <http://www.umd.nycpic.com/dmerc.html>

Elder Law Answers

Web: <http://www.elderlawanswers.com/>

ElderWeb

Web: <http://www.elderweb.com>

Empire State Association of Adult Homes and Assisted Living Facilities

646 Plank Road, Suite 207

Clifton Park, NY 12065

Tel: 518 371-2573

Fax: 518 371-3774

Email: nyasstliv@aol.com

Web: <http://www.ny-assisted-living.org/>

Empire Medicare Services

25 Orville Drive

Bohemia, New York 11716

Medicare Hot Line: 800 442-8430

Web: <http://www.empiremedicare.com/>

Federal Office of Inspector General of the U.S. Department of Health and Human Services

Web: <http://www.oig.hhs.gov/>





Friends and Relatives of Institutionalized Aged, Inc. (FRIA)

11 John Street, Suite 601

New York, NY 10038

Tel: 212 732-5667

Helpline: 212 732-4455

Fax: 212 732-6945

Email: fria@fria.org

Web: <http://www.fria.org>

Harvard Negotiation Project: Getting to Yes

Web: http://www.pon.org/catalog/product_info.php?products_id=119

Health Insurance Information Counseling and Assistance Program

NYS Office for the Aging

2 Empire State Plaza

Albany, New York 12223-1251

Senior Citizen Hot Line: 800 342-9871

Web: <http://www.hiicap.state.ny.us>

Healthcare Association of New York State (HANYS)

One Empire Drive

Rensselaer, NY 12144

Tel: 518 431-7600

Web: <http://www.hanys.org>

Long Term Care Community Coalition

242 West 30th Street, Suite 306

New York, NY 10001

Tel: 212 385-0355

Fax: 212 239-2801

Web: <http://www.ltccc.org>

Long Term Care Insurance

Web: <http://www.ins.state.ny.us/lntmcare.htm>

The National Alliance for the Mentally Ill (NAMI)

Colonial Place Three

2107 Wilson Boulevard, Suite 300

Arlington, VA 22201-3042

Tel: 703 524-7600

Fax: 703 524-9094

Web: <http://www.nami.org/>

The National Alzheimer Center of the Hebrew Home for the Aged at Riverdale

5901 Palisade Avenue

Riverdale, NY 10471

Tel: 718 581-1000

Web: <http://www.hebrewhome.org>

National Association for Homecare and Hospice (NAHC)

228 7th Street

Washington, DC 20003

Tel: 202 547-7424

Fax: 202 547-3540

Web: <http://www.nahc.org/>

National Association of Local Long Term Care Ombudsmen (NALLTCO)

Web: http://www.ltombudsman.org/ombpublic/49_347_968.cfm

National Association of State Long Term Care Ombudsman Programs (NASOP)

Web: http://www.ltombudsman.org/ombpublic/49_347_967.CFM

National Association of State Units on Aging (NASUA)

1201 15th Street, NW, Suite 350

Washington, DC 20005,

Tel: 202 898-2578

Fax: 202 898-2583

Email: cwellons@nasua.org

Web: <http://www.nasua.org/>

National Citizens' Coalition for Nursing Home Reform

1424 16th Street, NW, Suite 202

Washington, DC 20036

Tel: 202 332-2275

Fax: 202 332-2949

Email: ombudcenter@nccnhr.org

Web: <http://www.nccnhr.org/>

National Long Term Care Ombudsman Resource Center

1424 16th Street, NW, Suite 202

Washington, D.C. 20036.

Tel: 202 332-2275

Fax: 202 332-2949

Web: <http://www.ltombudsman.org/default.cfm>





Neighborhood Legal Services, Inc.

295 Main Street, Room 495

Buffalo, NY 14203

Tel: 716 847-0650

Fax: 716 847-0227

Web: <http://www.nls.org/>

New York Association of Homes and Services for the Aging

150 State Street, Suite 301

Albany, NY 12207-1698

Tel: 518 449-2707

Fax: 518 455-8908

Web: <http://www.nyahsa.org/>

New York Foundation for Senior Citizens

11 Park Place, 14th Floor

New York, NY 10007-2801

Tel: 212 962-7559

Email: nyfscinc@aol.com

Web: <http://www.nyfsc.org/index.shtml>

New York Legal Assistance Group (NYLAG)

Tel: 212 613-5000

Web: <http://www.nylag.org/>

NYS Bureau of Continuing Care

161 Delaware Avenue

Delmar, NY 12054

Tel: 800 206-8125

NYS Commission on Quality Care for the Mentally Disabled

401 State Street

Schenectady, NY 12305-2397

Tel: 800 624-4143

Email: webmaster@cqc.state.ny.us

Web: <http://www.cqc.state.ny.us/>

NYS Department of Health

Web: <http://www.health.state.ny.us/>

NYS Department of Social Services (Local Offices)

Web: <http://www.health.state.ny.us/nysdoh/medicaid/ldss.htm>

NYS Division of Criminal Justice Services

Web: <http://criminaljustice.state.ny.us/>

NYS Division of Human Rights

Web: <http://www.nysdhr.com/>

NYS Health Facilities Association (NYSHFA)

33 Elk Street, Suite 300

Albany, NY 12207-1010

Tel: 518 462-4800

Email: info@nyshfa.org

Web: <http://www.nyshfa.org/>

NYS Health Insurance Information Counseling and Assistance Program (HIICAP)

Web: <http://hiicap.state.ny.us/>

NYS Long Term Care Ombudsman Program

State Ombudsman: Martha Haase

2 Empire State Plaza, 5th Floor

Albany, NY 12223-1251

Tel: 518 474-7329 / 800 342-9871

Fax: 518 474-7761

Email: m_haase@ofa.state.ny.us

Web: <http://www.ombudsman.state.ny.us>

Online Omubdsman Directory:

<http://www.ombudsman.state.ny.us/Whois/directory.htm>

NYS Office for the Aging

2 Empire State Plaza, 5th Floor

Albany, NY 12223-1251

Tel: 518 474-5731 / 800 342-9871

Web: <http://aging.state.ny.us/index.htm>

NYS Office of Children and Family Services

52 Washington Avenue

Rensselaer, NY 12144

Tel: 518 402-3294 / 518 473-3236

Web: <http://www.ocfs.state.ny.us/main/>





NYS Office of Mental Health

Tel: 800 597-8481

Web: <http://www.omh.state.ny.us/>

NYS Office of the Attorney General

State Capitol

Albany, New York 12224

Medicaid Fraud Control Hot Line: 800 771-7755

Web: <http://www.oag.state.ny.us/>

NYS Office of the State Comptroller

110 State Street

Albany, NY 12236

Tel: 518 474-4044

Web: <http://www.osc.state.ny.us/>

NYS Partnership for Long Term Care

1 Commerce Plaza, Room 726

99 Washington Avenue

Albany, NY 12210

Tel: 518 473-8083

Email: pltc@health.state.ny.us

Web: <http://www.nyspltc.org/>

Nursing Home Checklist

Web: <http://www.medicare.gov/nursing/checklist.pdf>

Nursing Home Compare

Web: <http://www.medicare.gov/NHCompare>

Nursing Home Listings

Web: <http://www.health.state.ny.us/nysdoh/nursing/mframe4.htm>

Operation Restore Trust

Tel: 877 678-4697

Rare Disorders

Web: <http://www.rarediseases.org>

Senior Medicare Patrol Program (Operation Restore Trust)

Web: <http://www.aoa.gov/smp/index.asp>

Tips on Preparing M11 Q

Web: <http://www.wnylc.net/pdf/misc/QTIPS.htm>

United Health Care

Web: <http://www.uhc.com/>

United States Department of Health and Human Services

Web: <http://www.os.dhhs.gov>

United States Department of Health and Human Services, Office of Human Rights

Web: <http://www.hhs.gov/ocr/index.html>

United States Social Security Administration

Office of Public Inquiries

Windsor Park Building

6401 Security Blvd.

Baltimore, MD 21235

Tel: 800 772-1213

Web: <http://www.ssa.gov/>

Veterans Administration Nursing Home Care

Web: <http://www1.va.gov/GeriatricsSHG/page.cfm?pg=19>





County Ombudsman Contact Table

For the most current list of Ombudsmen, check the LTCOP website at:
<http://www.ombudsman.state.ny.us/Whois/directory.htm>.

COUNTY	NAME	PHONE	EMAIL
ALBANY	Edie Sennett	518 458-8111 x3006	sennett@redcrossny.org
ALLEGANY	Tobi Nickerson	585 268-9390	nickert@alleganyco.com
BROOME	Mary Vivona	607 722-1251	mcvivona@stny.rr.com
CATTARAUGUS	Cynthia Thropp	716 373-8032	cyntev@olean.cattco.org
CAYUGA	Pamela Anderegg	315 252-9596	pamanderegg@ccredcross.org
CHAUTAUQUA	Sherry Lantz	716 753-4471	Lantzs@co.chautauqua.ny.us
CHEMUNG	Kim Salisbury	607 737-5520	ksalisbury@co.chemung.ny.us
CHENANGO	Henry Drexler	607 337-1770	henryd@co.chenango.ny.us
CLINTON	Alan Bechard	518 563-9058 x107	AlanOmb@AOL.com
COLUMBIA	Kit Ali	518 828-4258	kali@govt.co.columbia.ny.us
CORTLAND	Elizabeth Haskins	607 753-5060	ehaskins@cortland-co.org
DELAWARE	Mary Vivona	607 722-1251	mcvivona@stny.rr.com
DUTCHESS	Ellen Ott	845 452-5600	onpoint654@aol.com
ERIE	Christian Reitler	716 878-2385	reitlerc@usa.redcross.org
ESSEX	Dawn Stoddard	518 873-3695	dstoddard@co.essex.ny.us
FRANKLIN	Judy Gardner	518 481-1527	jgardner@co.franklin.ny.us
FULTON	Susan Orcutt	518 736-5650	afettinger@co.fulton.ny.us
GENESEE	Ruth Spink	585 343-1611	rspink@co.genesee.ny.us
GREENE	Christine Young	518 943-5332	cyoung@discovergreene.com
HAMILTON	Harriet Bunker	518 761-6347	bunkerh@co.warren.ny.us

HERKIMER	Mr. Kelly Brown	315 866-2890	kellyb@mohawkvalleyredcross.org
JEFFERSON	Elnora Durgin	315 785-3191	ndurgin@gisco.net
LEWIS	David Bush	315 376-5313	dbush@lewiscountyny.org
LIVINGSTON	Substate Coordinator	585 243-7520	N/A
MADISON	Eileen Augustyn	315 684-3001 x115	ema9@cornell.edu
MONROE	Ronni Abramovitz	585 244-8400 x114	rabramovitz@lifespan-roch.org
MONTGOMERY	Edie Sennett	518 458-8111 x3006	sennett@redcrossnyny.org
NASSAU	Margaret Hromada	516 466-9718	ombudservice@familyandchildrens.org
NEW YORK CITY	Jacqueline Case	212 962-2720	jcaser@nyfscitcop.org
NIAGARA	Carolyn Dean	716 433-4441	daleombudsman@aol.com
ONEIDA	Stephen Gadziola	315 733-4666 x205	gadziola.utredcross@broadviewnet.net
ONONDAGA	Linda Kashdin	315 449-3552 x108	ltcop@ircny.org
ONTARIO	Ronni Abramovitz	585 244-8400 x114	rabramovitz@lifespan-roch.org
ORANGE	Ellen Ott	845 452-5600	onpoint654@aol.com
ORLEANS	Pamela Canham	585 589-3299 x3191	aging@orleansny.com
OSWEGO	Thelma Snyder	315 598-4712	tsnyder@oco.org
OTSEGO	Mandy Wust	607 432-9041	officeaging@stny.rr.com
PUTNAM	Doreen Crane	845 225-1034	doreen.crane@putnamcountyny.com
RENSSELAER	Carol Smith	518 270-2730	csmith@renesco.com
ROCKLAND	Michael Foer	845 364-2109	foberm@co.rockland.ny.us
ST. LAWRENCE	Stacey Kass	315 386-4730	skass@co.st-lawrence.ny.us
SARATOGA	Christina Sowle	518 884-4100	saraage1@govt.co.saratoga.ny.us
SCHENECTADY	Edie Sennett	518 458-8111 x3006	sennett@redcrossnyny.org
SCHOHARIE	Judith Sherman	518 234-4219	schofa@telenet.net
SCHUYLER	Substate Coordinator	607 535-7108	N/A
SENECA	Kim Pfeiffer	315 539-1767	kpfeiffer@co.seneca.ny.us
STEUBEN	Vicki Grace	607 776-7813	vickig@co.steuben.ny.us
SUFFOLK	Ruth Berger	631 427-3700 x273	rberger@fsl-li.org
SULLIVAN	Ellen Ott	845 452-5600	onpoint654@aol.com





TIOGA	Ombudsman Substate Coordinator	607 687-4120 x319	N/A
TOMPKINS	Regina McGriff	607 274-5486	rmcgriff@tompkins-co.org
ULSTER	Dolores Fredericks	845 340-3580	domsbuddy27@aol.com
WARREN	Harriet Bunker	518 761-6347	bunkerh@co.warren.ny.us
WASHINGTON	Annmarie Bacas	518 584-2510	asarc@together.net
WAYNE	Eileen Teeter	315 946-5624	eteeter@co.wayne.ny.us
WESTCHESTER	Margaret Hadad	914 345-3993 x234	hadadm@mhawestchester.org
WYOMING	Wendy Rogers	585 786-8833	wrogers@wyomingco.net
YATES	Jeff Angell	315 536-5515	angellj@adelphia.net
NEW YORK STATE	Martha Haase	518 474-7329 Hotline: 800-342-9871	m_haase@ofa.state.ny.us

AREAS WITHOUT A PROGRAM:

St. Regis

Seneca Nation





Ombudsman Case Form

1. Date Case opened: _____
2. Facility Type: NF ACF Other: _____
3. Facility: _____
4. Ombudsman: _____
5. Resident: _____
6. Name of Complainant (if not resident): _____
7. Permission to reveal identity? No Yes, Date: _____
8. Complainant Type by Code (see instructions): _____
9. Problems or issues (use back for additional space):

10. Action Initiated: Date _____
Brief description (use back for additional space):

11. Was referral made? No Yes, Referral made to: _____
12. Date case closed: _____
13. Barriers to Resolution, if any (attach additional sheets if necessary):

14. Complainant Satisfied? Yes No
15. Ombudsman Satisfied? Yes No

FOR STAFF AND/OR VOLUNTEER TO COMPLETE

16. Complaint Codes (see complaint categories)

17. Verified Yes or No

18. Disposition by Code Number (see instructions)

Notes/Additional Space





CASE FORM INSTRUCTIONS

1. The date the case is reported or identified by the Ombudsman.
2. Check the type of facility the resident resides in. If it is other than a nursing facility or an adult care facility, please specify.
3. Name of facility involved.
4. Name of Ombudsman investigating case.
5. Resident's name (required, even when resident does not want identity revealed)
6. The name of complainant if different from resident.
7. This is a record of verbal permission from the complainant to reveal his or her identity if necessary to resolve the case.
8. Indicate the complainant by the following code number:
 1. Resident
 2. Relative/friend of resident
 3. Non-relative guardian, legal representative
 4. Ombudsman/Ombudsman Volunteer
 5. Facility administrator or staff
 6. Other medical: physician/staff
 7. Representative of other social service agency or program
 8. Unknown/anonymous
 9. Other
9. Briefly describe case.
10. Indicate date action is initiated and provide a brief summary of the action taken to resolve the case.
11. A referral is outside of the facility such as regulatory agencies and legal assistance.
12. A case is closed when Ombudsman activity on a case has stopped for any of the following reasons: resolution or partial resolution; by request of the complainant; complaint(s) unresolvable; complaint(s) not verified; resident died and no further investigation was required; or complaint(s) referred to other agency for resolution and final disposition was not obtained and/or reported to Ombudsman.
13. Indicate any barriers to completing a satisfactory resolution of the case.
14. Indicate if the complainant was satisfied with the outcome of the case.
15. Indicate if the Ombudsman was satisfied with the outcome of the case.
16. Provide a description of the complaint by code number. See attached complaint codes.
17. Ombudsman always attempt to verify complaints, but they work to resolve a complaint whether it is verified or not. Definition of verified: It is determined after work

(interviews, record inspection, observation, etc.) that the circumstances described in the complaint are substantiated or generally accurate.

18. Indicate the disposition of the complaint by following code letters/numbers:
 - a. For which government policy or regulatory change or legislative action was required to resolve.
 - b. Which were not resolved to satisfaction of resident or complainant.
 - c. Which were withdrawn by the resident or complainant.
 - d. Which were referred to other agency for resolution and:
 1. report of final disposition was not obtained;
 2. other agency failed to act on complaint.
 - e. For which no action was needed or appropriate.
 - f. Which were partially resolved but some problem remained.
 - g. Which were resolved to the satisfaction of resident or complainant.





**OFFICE OF THE STATE LONG TERM CARE
OMBUDSMAN, NEW YORK STATE OFFICE FOR THE
AGING**

Authorization for Access to Resident Records

I give permission to release any information to _____

from my medical, financial and/or my personal records. I understand that this information will remain confidential and will be used by the above named NYS certified ombudsman to assist me.

Resident's Name _____

Room # _____

Resident's Signature* _____

Date _____

Witness (optional) _____

Date _____

Or

Resident's
Representative _____

Date _____

* Written consent also includes contemporaneously oral to written consent when the resident has difficulty or prefers not to sign personally.

**OFFICE OF THE STATE LONG TERM CARE
OMBUDSMAN, NEW YORK STATE OFFICE FOR THE
AGING**

Authorization for Access to Resident Records

I give permission to release any information to _____

from my medical, financial and/or my personal records. I understand that this information will remain confidential and will be used by the above named NYS certified ombudsman to assist me.

Resident's Name _____

Room # _____

Resident's Signature* _____

Date _____

Witness (optional) _____

Date _____

Or

Resident's
Representative _____

Date _____

Coordinator's
Signature _____

Date _____

* Written consent also includes contemporaneously oral to written consent when the resident has difficulty or prefers not to sign personally.





Laws Relating to the NYS Long Term Care Ombudsman Program

A NOTE ON RECENT NYS LAW CHANGES

For nearly 40 years, Article 19-J of the NYS Executive Law has provided the statutory authority for the programs and services administered by the New York State Office for the Aging (NYSOFA).

Article 19-J was repealed on October 26, 2004, when Chapter 642 of the Laws of 2004 became effective. This does not mean that NYSOFA, aging programs and services, such as the Long Term Care Ombudsman Program, ceased to exist.

Article 19-J may have been repealed, but it is not gone. It has simply been moved word for word, comma for comma and section for section to a new location and given a new name. Article 19-J is now located in a newly created chapter of the NYS Consolidated Laws. This new chapter is Chapter 35 A, which will be better and more commonly known as the Elder Law.

What was once Article 19 -J is now Title 1 of Article II of the Elder Law. Title I of Article II now has all relevant provisions and programs. Community Service for the Elderly, once found in § 541 of the Executive Law, is now found in § 214 of the Elder Law. The Naturally Occurring Retirement Community Supportive Service Program, also known as NORCS, is no longer located at § 536 g of the Executive Law. Instead it is now at Elder Law § 209. The Advisory Committee is now appointed pursuant to § 210 instead of § 537. The Long Term Care Ombudsman Program is now governed by § 218 instead of § 544 a.

Please refer to the following conversion chart which connects each and every provision and program formerly found in Article 19 J to its location in the new law.

CONVERSION CHART FOR ARTICLE 19-J TO THE ELDER LAW

Former Section*	New Section	Subject
535	201.	Office for the aging; director.
536	202.	General powers and duties of office.
536-a	203.	Programs for the aging.
536-b	204.	Records of available space.
536-c	205.	Exclusion from mandatory retirement.
536-d	206.	Informal caregiver training.
536-e	207.	Foster grandparents program for vulnerable infants and children.
536-f	208.	Respite program.
536-g	209.	Naturally occurring retirement community supportive service program.
537	210.	Advisory committee.
538	211.	Assistance of other agencies.
539	212.	Grants or gifts.
540	213.	Reports.

541	214.	Community services for the elderly.
541-a	216.	Advisory council to the recreation program for the elderly created; functions, powers and duties.
543-a	217.	Congregate services initiative for the elderly.
544-a	218.	Long term care ombudsman.
545	219.	Elderly abuse education and outreach program.
546	220.	Resident advisor program.
546-a	221.	Legislative findings and objectives.
546-b	222.	Senior citizen energy packaging pilot program.

* Former section from Article 19-J of the NYS Executive Law.

STATE LONG TERM CARE OMBUDSMAN PROVISIONS IN THE OLDER AMERICANS ACT, AS AMENDED IN 2000

By Topic, With Policy Interpretations

State Long Term Care Ombudsman Provisions
In the Older Americans Act, as Amended in 2000
By Topic, With Policy Interpretations

This document was compiled in October 1999 by Administration on Aging (AOA) Ombudsman Program Specialist Sue Wheaton and updated following enactment of the 2000 Amendments to the Older Americans Act. The policies included were developed by AOA over a period of many years.

References are to PL 106-501, 42 U.S.C. 3058f. Italics indicate new or revised provisions in the 2000 Amendments to the Older Americans Act (OAA).

GENERAL TITLE VII REQUIREMENTS

TITLE VII – ESTABLISHMENT, AUTHORIZATION OF APPROPRIATIONS, ALLOTMENTS FOR VULNERABLE ELDER RIGHTS PROTECTION ACTIVITIES

Older Americans Act Language
SUBTITLE A – STATE PROVISIONS
CHAPTER 1 – GENERAL STATE PROVISIONS

Sec. 701

SEC. 701. ESTABLISHMENT.

The Assistant Secretary, acting through the Administration, shall establish and carry out a program for making allotments to States to pay for the cost of carrying out vulnerable elder rights protection activities.

Sec. 702

SEC. 702. AUTHORIZATION OF APPROPRIATIONS.

(a) Ombudsman Program.--There are authorized to be appropriated to carry out chapter 2, such sums as may be necessary for fiscal year 2001, and such sums as may be necessary for subsequent fiscal years.

(b) Prevention of Elder Abuse, Neglect, and Exploitation.--There are authorized to be appropriated to carry out chapter 3, such sums as may be necessary for fiscal year 2001, and such sums as may be necessary for subsequent fiscal years.

(c) Legal Assistance Development Program.--There are authorized to be appropriated to carry out chapter 4, such sums as may be necessary for fiscal year 2001, and such sums as may be necessary for subsequent fiscal years.





Sec. 703

SEC. 703. ALLOTMENT.

(a) In General.--

(1) Population.--In carrying out the program described in section 701, the Assistant Secretary shall initially allot to each State, from the funds appropriated under section 702 for each fiscal year, an amount that bears the same ratio to the funds as the population of older individuals in the State bears to the population of older individuals in all States.

(2) Minimum allotments.--

(A) In general.--After making the initial allotments described in paragraph (1), the Assistant Secretary shall adjust the allotments on a pro rata basis in accordance with subparagraphs (B) and (C).

(B) General minimum allotments.--

(i) Minimum allotment for states.--No State shall be allotted less than one-half of 1 percent of the funds appropriated under section 702 for the fiscal year for which the determination is made.

(ii) Minimum allotment for territories.--Guam, the United States Virgin Islands, and the Trust Territory of the Pacific Islands, shall each be allotted not less than one-fourth of 1 percent of the funds appropriated under section 702 for the fiscal year for which the determination is made. American Samoa and the Commonwealth of the Northern Mariana Islands shall each be allotted not less than one-sixteenth of 1 percent of the sum appropriated under section 702 for the fiscal year for which the determination is made.

(C) Minimum allotments for Ombudsman and elder abuse programs.--

(i) Ombudsman program.--No State shall be allotted for a fiscal year, from the funds appropriated under section 702 and made available to carry out chapter 2, less than the amount allotted to the State under section 304 in fiscal year 2000 to carry out the State Long Term Care Ombudsman program under title III.

(ii) Elder abuse programs.--No State shall be allotted for a fiscal year, from the funds appropriated under section 702 and made available to carry out chapter 3, less than the amount allotted to the State under section 304 in fiscal year 2000 to carry out programs with respect to the prevention of elder abuse, neglect, and exploitation under title III.

(D) Definition.--For the purposes of this paragraph, the term "State" does not include Guam, American Samoa, the United States Virgin Islands, the Trust Territory of the Pacific Islands, and the Commonwealth of the Northern Mariana Islands.

(b) Reallotment.--

(1) In general.--If the Assistant Secretary determines that any amount allotted to a State for a fiscal year under this section will not be used by the State for carrying out the purpose for which the allotment was made, the Assistant Secretary shall make the amount available to a State that the Assistant Secretary determines will be able to use the amount for carrying out the purpose.

(2) Availability.--Any amount made available to a State from an appropriation for a fiscal year in accordance with paragraph (1) shall, for purposes of this subtitle, be regarded as part of the allotment of the State (as determined under subsection (a)) for the year, but shall remain available until the end of the succeeding fiscal year.

(c) Withholding.--If the Assistant Secretary finds that any State has failed to carry out this title in accordance with the assurances made and description provided under section 705, the Assistant Secretary shall withhold the allotment of funds to the State. The Assistant Secretary shall disburse the funds withheld directly to any public or nonprofit private institution or organization, agency, or political subdivision of the State submitting an approved plan containing the assurances and description.

ORGANIZATION

Sec. 704

SEC. 704. ORGANIZATION.

In order for a State to be eligible to receive allotments under this subtitle--

(1) the State shall demonstrate eligibility under section 305;

(2) the State agency designated by the State shall demonstrate compliance with the applicable requirements of section 305; and

(3) each area agency on aging designated by the State agency and participating in such a program shall demonstrate compliance with the applicable requirements of section 305.

ADDITIONAL STATE PLAN REQUIREMENTS

Sec. 705

SEC. 705. ADDITIONAL STATE PLAN REQUIREMENTS.

(a) Eligibility.--In order to be eligible to receive an allotment under this subtitle, a State shall include in the State plan submitted under section 307--

(1) an assurance that the State, in carrying out any chapter of this subtitle for which the State receives funding under this subtitle, will establish programs in accordance with the requirements of the chapter and this chapter;

(2) an assurance that the State 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, and other interested persons and entities regarding programs carried out under this subtitle;

(3) an assurance that the State, in consultation with area agencies on aging, will identify and prioritize statewide activities aimed at ensuring that older individuals have access to, and assistance in securing and maintaining, benefits and rights;

(4) an assurance 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 each of the vulnerable elder rights protection activities described in the chapter;

(5) an assurance that the State will place no restrictions, other than the requirements referred to in clauses (i) through (iv) of section 712(a)(5)(C), on the eligibility of entities for designation as local Ombudsman entities under section 712(a)(5);

(6) an assurance that, with respect to programs for the prevention of elder abuse, neglect, and exploitation under chapter 3--

(A) in carrying out such programs the State agency will conduct a program of services consistent with relevant State law and coordinated with existing State adult protective service activities for--

(i) public education to identify and prevent elder abuse;

(ii) receipt of reports of elder abuse;

(iii) active participation of older individuals participating in programs under this Act through outreach, conferences, and referral of such individuals to other social service agencies or sources of assistance if appropriate and if the individuals to be referred consent; and

(iv) referral of complaints to law enforcement or public protective service agencies if appropriate;

(B) the State will not permit involuntary or coerced participation in the program of services described in subparagraph (A) by alleged victims, abusers, or their households; and

(C) all information gathered in the course of receiving reports and making referrals shall remain confidential except--

(i) if all parties to such complaint consent in writing to the release of such information;

(ii) if the release of such information is to a law enforcement agency, public protective service agency, licensing or certification agency, Ombudsman program, or protection or advocacy system; or

(iii) upon court order ;and

(7) a description of the manner in which the State agency will carry out this title in accordance with the assurances described in paragraphs (1) through (6).

(b) Privilege.--Neither a State, nor a State agency, may require any provider of legal assistance under this subtitle to reveal any information that is protected by the attorney-client privilege.

TITLE VII, CHAPTER 2 – OMBUDSMAN PROGRAMS

DEFINITIONS

Older Americans Act Language

Sec. 711

SEC. 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.

Note: All provisions which follow are in Sec. 712, unless otherwise indicated.





ESTABLISHMENT AND PROGRAM PLACEMENT

Older Americans Act Language

Sec. 712. Establishment.--

(a)(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.

CONTRACTS AND ARRANGEMENTS FOR OPERATING THE PROGRAM: PROHIBITION AGAINST CONTRACTING WITH LICENSING/CERTIFICATION AGENCY OR ASSOCIATION OF FACILITIES

Older Americans Act Language

(a)(4)(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.

FULL-TIME OMBUDSMAN REQUIREMENT

Older Americans Act Language

(a)(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....

AOA Policy Interpretation

"Full-time basis" means the position is full-time, and the individual who serves in the position has no duties other than those directly related to the Long Term Care Ombudsman Program, as defined in Section 712 of the Act.

FACILITIES COVERED

Older Americans Act Language

Sec.102 (32) 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. 1395i093(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)(9) 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).

Sec. 102 (18) The term "board and care facility" means an institution regulated by a State pursuant to section 1616(e) of the Social Security Act (42U.S.C. 1382e(e)).

AOA Policy Interpretation

Assisted living facilities are included under Sec. 102 (32)(D). Nursing homes and adult care homes similar to board and care homes where all residents are private-pay are included. Rationale: the Older Americans Act is for all older people in the U.S. age 60 plus and above, and the definition of "resident" in Section 711(6) is "an older individual who resides in a long term care facility." (See policy under program clients, below.)

PROGRAM CLIENTS AND FUNCTIONS

Older Americans Act Language

(a)(3) Functions.-- The Ombudsman shall...personally or through representatives of the Office--

- (A) identify, investigate, and resolve complaints that--
 - (i) are made by, or on behalf of, residents;

AOA Policy Interpretation Regarding Clients

The primary role of the Ombudsman is to advocate for the rights and interests of residents of long term care facilities.

The Ombudsman may serve residents in facilities which are all private pay. The Older Americans Act is for all older people in the U.S. age 60 and above, and the definition of "resident" is "an older individual who resides in a long term care facility." (OAA Section 711(6))

Long-standing AOA policy is that the Ombudsman and Ombudsman representatives may serve disabled individuals under the age of 60 who are living in long term care facilities, if such service does not weaken or decrease service to older individuals covered under the Act.

PROGRAM FUNCTIONS (CONTINUED)

Older Americans Act Language

(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.

LOCAL OMBUDSMAN ENTITIES AND REPRESENTATIVES

Older Americans Act Language

(a)(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.

Policy Interpretation on State Ombudsman Authority

The State Ombudsman has the authority to designate local Ombudsman entities and Ombudsman representatives to participate in the statewide Ombudsman Program and to revoke designation, if necessary.

Older Americans Language





(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 and not stand to gain financially through an action or potential action brought on behalf of individuals the Ombudsman serves;

Policy Interpretation of Local Ombudsman Conflict-of-Interest

Local Ombudsman entities and representatives must have no conflict-of-interest, as defined in the conflict-of-interest section of the Act.

Older Americans Act Language

- (iii) in the case of the entities, be public or nonprofit private entities; and
- (iv) meet such additional requirements as the Ombudsman may specify.

STATE OMBUDSMAN PROGRAM POLICIES AND PROCEDURES

Older Americans Act Language

(a)(5)(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.

CONFIDENTIALITY AND DISCLOSURE

Older Americans Act Language

(a)(5)(D)(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.

(Skip to 712(d)(1) for disclosure.)

(d)(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.

Policy Interpretation on Mandatory State Abuse Reporting Laws and Ombudsman Disclosure

Representatives of the Ombudsman Program may not be required to disclose the identity of a complainant or resident except under conditions outlined in section 712(d) of the Act. Federal law supersedes state law in instances where state law mandates that Ombudsmen report all incidents of abuse. In such instances, Ombudsmen must follow the disclosure procedure outlined in Section 712 (d).

Policy Interpretation on Freedom of Information Act Requests

Ombudsman records are not subject to the federal Freedom of Information Act (FOIA), inasmuch as the FOIA applies only to federal agency records, and records maintained by a state Ombudsman are not federal records. Regarding state FOIA statutes, which many legislatures have enacted for purposes of disclosure of state records, the requirements and exemptions are similar but not necessarily identical to those in the federal FOIA. If disclosure were requested pursuant to such a state statute, it is likely but not certain that there would be an exemption for records, such as Ombudsman records, that are made confidential by statute. If there were no such exemption in the state FOIA statute and a conflict between the state statute and the OAA could not be avoided, then the federal position would be that the OAA prevails under the Supremacy Clause of the U.S. Constitution.

ACCESS TO FACILITIES AND RESIDENTS

Older Americans Act Language

(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;...
- (2) Procedures.--The State agency shall establish procedures to ensure the access described in paragraph (1).

OBRA Statutory Requirement Regarding Ombudsman Access to Facilities and Residents

The Omnibus Budget and Reconciliation Act of 1987 (OBRA '87), known as the Nursing Home Reform Act, amended Sections 1819 (Medicare) and 1919 (Medicaid) (c)(3)(A) of the Social Security Act as follows: "(3) ACCESS AND VISITATION RIGHTS.- A nursing facility must-(A) permit immediate access to any resident by any representative of the Secretary, by any representative of the State, by an Ombudsman...or by the resident's individual physician." Since board and care and similar facilities (such as assisted living facilities) are not covered under OBRA and are regulated entirely by state government, states must ensure Ombudsman access to these facilities through state statute, regulation, executive order or policy.

ACCESS TO RECORDS

Older Americans Act Language

(b) Procedures for Access.--

- (1) In general.--The State shall ensure that representatives of the Office shall have-
 - (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).



OBRA Statutory Requirement Regarding Ombudsman Access to Records

The Omnibus Budget and Reconciliation Act of 1987 (OBRA '87), known as the Nursing Home Reform Act, amended Sections 1819 (Medicare) and 1919 (Medicaid) (c)(3)(E) of the Social Security Act as follows: "ACCESS AND VISITATION RIGHTS.- A nursing facility must - (E) permit representatives of the state Ombudsman...with the permission of the resident (or the resident's legal representative) and consistent with State law, to examine a resident's clinical records."

Note: Since board and care and similar facilities (such as assisted living facilities) are not covered under OBRA and are regulated entirely by state government, to be in compliance with the Older Americans Act, states must ensure Ombudsman access to resident and other records for these facilities through state statute, regulation, executive order or policy.

STATEWIDE UNIFORM REPORTING SYSTEM AND REPORTS

Older Americans Act Language

(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).

(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);

(The AOA reporting requirement is in section 207(b) of the OAA.)

Background and AOA Policy Regarding Ombudsman Reporting

States must submit annual Ombudsman reports to AOA by a specified date early each year for the previous fiscal year, Oct. 1 through Sept. 30. To ensure compatibility of data, AOA and state Ombudsmen jointly developed a standard report-

ing system, the National Ombudsman Reporting System (NORS), which was initiated in 1995-96. States must submit their reports on a diskette or by e-mail on a standard computer format entitled the National Ombudsman Reporting Data Input Application (NORDIA). AOA issues instructions each year regarding submission of the report. States have developed and use a variety of different software systems to collect case and complaint data and other information. Typically, these systems involve data entry at the local Ombudsman program level and compilation at the state level. The most useful systems are relational, in that they can relate one set of data to another set of data.

CONSULTATION WITH AREA AGENCIES

Older Americans Act Language

(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.

CONFLICT-OF-INTEREST

Older Americans Act Language

(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.

AOA Policies Regarding Conflict-of-Interest

"Immediate family" means spouse, parents, children and siblings.

It would be a conflict of interest for an official or employee of any agency at either the state or local level which directly administers the licensing and certification of long term care facilities or owns or operates such facilities, or provides services to residents of such facilities, to designate or remove from office the Ombudsman or Ombudsman representatives.

Employment by a long term care facility or otherwise receiving, directly or indirectly, remuneration from an owner or operator of a long term care facility is a clear conflict of interest for any representative of the Ombudsman program. Individuals employed by a long term care facility, an association of facilities, a business or agency which provides services in long term care facilities or to residents or an agency which licenses or certifies facilities or facility administrators must not be permitted to serve the statewide Ombudsman program in any decision-making, policy-setting or program operation capacity. This applies to both paid and volunteer Ombudsman staff and Ombudsman program boards. The Ombudsman program may, of course, seek both information and advice from such individuals.

It is incumbent upon the state agency on aging and the established office of the Ombudsman in a state to ensure that, in the conduct of all aspects of the statewide long Term Care Ombudsman program, the integrity of the work of the Ombudsman and Ombudsman representatives is maintained. There must be no inappropriate or improper influence from any individual or entity, regardless of the source, which will impact on the objectivity of the investigation or outcome of complaints or the





Ombudsman's work to resolve major issues related to the rights, quality of care and quality of life of the residents of long term care facilities.

LEGAL COUNSEL

Older Americans Act Language

(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.

TRAINING

Older Americans Act Language

(h) Administration.--The State agency shall require the Office to--

(4)(A) strengthen and update 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; and

(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;

COORDINATION WITH PROTECTION AND ADVOCACY SYSTEMS FOR INDIVIDUALS WITH DEVELOPMENTAL DISABILITIES AND MENTAL ILLNESSES AND LEGAL SERVICES

Older Americans Act Language

(h)(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;

(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).

LIABILITY

Older Americans Act Language

(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.

NONINTERFERENCE

Older Americans Act Language

(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.

REGULATIONS

Older Americans Act Language

Sec. 713

SEC. 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).

FUNDING/FISCAL POLICIES

(Fiscal requirements for the Ombudsman Program are in Title III and Title VII. The source of much of the funding policy provided below is AOA PI 94-2, issued April 5, 1994.)

TITLE III SOCIAL SERVICES (III-B) FUNDS FOR OMBUDSMAN ACTIVITIES

Older Americans Act Language

Section 304(d)(1) From any State's allotment, after the application of section 308(b), under this section for any fiscal year--

(A) such amount as the State agency determines, but not more than 10 percent thereof, shall be available for paying such percentage as the agency determines, but not more than 75 percent, of the cost of administration of area plans;

(B) such amount (excluding any amount attributable to funds appropriated under section 303(a)(3)) as the State agency determines to be adequate for conducting an effective Ombudsman program under section 307(a)(9) shall be available for conducting such program; (emphasis added)

Background and Policy Interpretation

This is the statutory provision under which states provide most of the Ombudsman Program funding. It means that of the funds Congress appropriates each year to the states for social services under the Older Americans Act, after state and area agency administration funding is provided, states may use "such amount as the State agency determines to be adequate for conducting an effective Ombudsman Program" before this money is distributed to the area agencies through the Title III intrastate funding formula. States may use these funds for their statewide Ombudsman activities at the state or local level. There is no separate match for Ombudsman funds taken "off the top." Area agencies may also use Title III funds which they receive through the intrastate funding formula for Ombudsman activities.

MINIMUM REQUIRED OMBUDSMAN PROGRAM FUNDING LEVEL FOR STATE AND AREA AGENCIES ON AGING

For States

Older Americans Act Language – State Plans

Sec. 307(a)(9) The plan shall provide assurances that the State agency will carry out, through the Office of the State Long Term Care Ombudsman, a State Long Term Care Ombudsman program in accordance with section 712 and this title, and will expend for such purposes an amount that is not less than an amount expended by the State agency with funds received under this title for fiscal year 2000, and an amount that is not less than the amount expended by the State agency with funds received under title VII for fiscal year 2000. (Replaced Sec. 307(a)(21))

For Area Agencies

Older Americans Act Language – Area Agencies

Sec. 306(a)(9) (The area plan must) provide assurances that the area agency, in carrying out the State Long Term Care Ombudsman Program under section 307(a)(9), will expend not less than the total amount of funds appropriated under this Act and expended by the agency in fiscal year 2000 in carrying out such a program under this title. (Replaced Section 306(a)(11))





NON-SUPPLANTATION PROVISIONS

Older Americans Act Language

Section 321(d) Funds made available under this part shall supplement, and not supplant, any federal, State, or local funds expended by a State or unit of general purpose local government (including an area agency on aging) to provide services described in subsection (a).

705(a)(4) In order to be eligible to receive an allotment under this subtitle, a State shall include in the State plan submitted under section 307B an assurance that the State will use funds made available under this subtitle 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 enactment of this subtitle, to carry out each of the vulnerable elder rights protections activities described in this chapter.

Discussion of Minimum Funding and Non-Supplantation Provisions

The 2000 amendments to the OAA retained and updated the state and area agency Ombudsman minimum funding requirements and the Title VII non-supplantation provision and added a new non-supplantation provision to Title III.

The Senate Committee report elaborated on that body's intent relative to the funding provisions for Ombudsman programs:

It is the committee's intent for a State to expend in subsequent years, at a minimum, the amount spent by the State on its Long Term Care Ombudsman Program in FY 2000, in addition to any increase in funding provided for Ombudsman activities in each fiscal year under Title VII. (The Senate Committee on Health, Education, Labor and Pensions [HELP] report "Older Americans Act Amendments of 1999," Senate Committee Report 106-399, page 5)

Taken together, the minimum funding and non-supplantation requirements mean that States must expend on their statewide Ombudsman programs no less than they expended in Title III funds (federal and 15% non-federal match) for FY 2000, plus provide increases in funding when Title VII Long Term Care Ombudsman program appropriations increase. This amount must be expended annually on Ombudsman services to residents of long term care facilities, as defined in Sections 102(18) and (32), 307(a)(12) and 711(6) of the Act. All of the Title VII Ombudsman funding appropriated by Congress and allotted to a State for a specific year must be expended on direct costs of the Ombudsman Program. Area agencies must expend on activities of the Ombudsman Program, as defined in Section 712 of the Act, not less than the total amount of Title III funds received under Section 304(d)(1)(D) and expended by the area agency in carrying out the Ombudsman Program under Title III in FY 2000.

State or unit of general purpose local government (including area agencies on aging) may not use Ombudsman Title VII funds to supplant, replace, or in substitution for, any other federal, State or local funding expended pursuant to federal, State or local funding laws that were in effect on or before 11/12/00, which was one day before the date of the enactment of Public Law 106-510.

ALLOWABLE USES OF TITLE VII ABUSE PREVENTION AND OMBUDSMAN PROGRAM FUNDING

States may use any portion of their Title VII abuse prevention allotment to fund specific, identifiable activities conducted by any public or private non-profit program or agency, including adult protective services and Ombudsman programs, which directly correspond to the abuse prevention activities outlined in Section 721(b) of the OAA.

States may not provide any of their Title VII abuse prevention allotment to adult protective services agencies to conduct activities or provide services not authorized in Section 721(b).

Use of Title VII funding for involuntary services to, or coerced participation in, Title VII-funded programs by alleged victims, abusers or their households, is strictly prohibited.

Use of any of the Title VII Ombudsman allotment to fund activities which are not authorized under Section 712 of the OAA and conducted by the Ombudsman Program or a grantee or contractor of the Ombudsman Program is prohibited. This includes, but is not limited to, Ombudsman services in settings other than long term care facilities, as defined in Section 102(18) and (32) of the OAA, and activities under Title VII, Chapters 3, and 4 conducted by individuals or agencies other than the Ombudsman or Ombudsman Program, or the Ombudsman's grantee or contractor.

Rationale for Policy on Use of Abuse Prevention and Ombudsman Funds



Section 721(d)(3) specifically requires coordination of elder abuse, neglect and exploitation prevention activities with the Long Term Care Ombudsman Program in the state. Many Ombudsman activities help prevent elder abuse, neglect and exploitation in nursing homes, board and care homes and similar adult care facilities; and Ombudsmen routinely carry out several of the activities listed in Section 721(b), as applicable to these settings. Such activities include:

- public education and outreach to help identify and prevent elder abuse, neglect and exploitation;
- coordination of services with the State adult protection service program;
- data collection on the extent of abuse, neglect and exploitation in long term care facilities;
- analysis of information and identification of service, enforcement or intervention needs;
- training for individuals, professionals and paraprofessionals on prevention of abuse and enhancement of residents' self-determination and autonomy; and
- technical assistance and training for individuals, including local Ombudsman representatives, who provide services for victims of abuse and their families.

Prior to enactment of the 1992 OAA amendments, the elder abuse prevention provision was in Title III, Part G of the Act. The Fiscal Year 1991 appropriation provided separate funding for both abuse prevention activities under Part G and Ombudsman activities. The conference report for the FY 1991 appropriation stated:

It is the expectation of the conferees that the States be given discretion in the allocation of the elder abuse funds so as to provide for the most effective elder abuse prevention efforts. It is further the conferees' expectation that portions of the elder abuse funds will be made available to State Long Term Care Ombudsman programs to address complaints of abuse in long term care facilities, including board and care homes. (Congressional Record H.10798, October 20, 1990.)

The 1992 OAA amendments moved both the Ombudsman and elder abuse program provisions from Title III to the new Title VII, and the Fiscal Year 1993 Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriation Act provided Title VII funding for both programs.

The logic of the use of elder abuse prevention funds, as expressed in the legislative history, carries over from Title III, Part G to Title VII. There is no basis in the legislative history or in practical application for states to use Ombudsman Program money to fund abuse prevention activities conducted outside of the Ombudsman Program.

There is no basis in the law or the legislative history for states to use funding provided to conduct Ombudsman services, as defined in Section 712 of the OAA, to fund Ombudsman or advocacy services for individuals living in their own homes or receiving acute medical care in facilities not covered under the definitions of long term care facilities in the OAA.

NON-APPLICABILITY OF THE INTRASTATE FUNDING FORMULA TO TITLE VII FUNDING

Policy

The intrastate funding formula applies only to Title III funds under Section 304(d)(1)(D) and does not apply to Title VII.

Discussion

The purpose of Title VII is to focus attention on advocacy programs which the states, not the area agencies, have the responsibility to establish and operate. States may designate funding under the various chapters of Title VII for area agency activities or activities conducted by other local or regional agencies or organizations which correlate with the purpose of the funding under a particular chapter, but this should be done for targeted and approved activities, not by the established Title III formula. The Joint Explanatory Statement of the Committees of Jurisdiction, Older Americans Act Amendments of 1992 states:

...the current Title III requirements governing the allocation of funds within states are not applicable to funds made available under any part of Title VII nor are area agencies the only entities eligible to receive grants from states under any part of Title VII. In addition, states may use funds available under Title VII to directly carry out vulnerable elder rights protection activities. (138 Congressional Record, S125, 13503 [daily ed. September 15, 1992])

Section 762 of the OAA makes it clear that a state may carry out Title VII activities either directly or through contracts or agreements with public or nonprofit private agencies or organizations, including but not limited to area agencies. The intent is that states direct the use of Title VII money for activities within the state which are planned and coordinated by the State Agency on Aging. Section 705(a)(1) and (2) make clear that states are to consult with area agencies and others in identifying and prioritizing statewide activities conducted under Title VII.



In fact, the nature of the intrastate funding formula is such that it is not applicable to the Title VII chapters. For example, in distributing funds under Chapter 2, it would be reasonable for states to provide funding to stimulate development of new local Ombudsman programs and take into account the location and size of long term care facilities, which are the major influence on workload for local Ombudsmen and volunteers. The distribution of nursing and board and care homes might be different than the distribution of older people in the state and the other factors which affect the intrastate funding formula.

NON-INCLUSION OF TITLE VII FUNDS IN THE CALCULATION OF STATE ADMINISTRATIVE COSTS

Policy

States may not include any Title VII funding in their calculation of funds available for state plan administration.

Discussion

There is absent any reference in the OAA to Title VII allotments in calculating funding for administration of state plans. On the other hand, it is quite clear that the OAA authorizes States to allocate five percent, or \$800,000, whichever is greater, of their cumulative total Title III allotments for meeting administrative costs.

The programs under Title VII, unlike most of the programs under Title III, are established and operated as direct advocacy services by the State Agency on Aging and/or agencies with which the State Agency contracts or provides grants to operate the programs. Thus, at least some, if not all, of the Title VII funds are used to pay directly for such administrative costs as staff, offices expenses, travel, etc. Therefore, a major funding principle to which States need to adhere with regard to Title VII is that all funding allotted for a particular Title VII chapter must be used to carry out the requirements and activities specified for that chapter in the OAA.

NON-INCLUSION OF TITLE VII FUNDS IN THE CALCULATION OF FUNDS FOR AREA PLAN ADMINISTRATION

Policy

Title VII funds allotted to the States should not and may not be included in the base amount used to calculate the limitation on the use of funds for area plan administration under the provisions of Section 304(d)(1)(A) of the OAA.

Discussion

There is no legislative basis for inclusion of Title VII funding in the calculation for determining area agency funding for administration of area plans. The provisions of Section 304 apply to Title III funds, not Title VII funds. Title VII funds are excluded from funds distributed to area agencies through the intrastate funding formula. Therefore, the Title III formula for calculation of funding for area plan administration may not be applied to the Title VII funding allotted to a state.

NO TITLE VII MATCHING REQUIREMENT

The provisions in the OAA regarding matching funds, Sections 304(d)(1)(D) and 308(a)(1), apply to Title III funds. There is no statutory base to require states to match federal funding they receive under Title VII; therefore, there is no federal matching requirement for Title VII funds. States, however, are not precluded from requesting a match to Title VII funds which they award by grant or contract to another agency or organization.

OFFICE OF LONG TERM CARE OMBUDSMAN PROGRAMS IN THE ADMINISTRATION ON AGING

Older Americans Act Language

Sec. 201(d)(1) There is established in the Administration the Office of Long Term Care Ombudsman Programs (in this subsection referred to as the "Office").

(2)(A) The Office shall be headed by a Director of the Office of Long Term Care Ombudsman Programs (in this subsection referred to as the "Director") who shall be appointed by the Assistant Secretary from among individuals who have expertise and background in the fields of long term care advocacy and management. The Director shall report directly to the Assistant Secretary.

(B) No individual shall be appointed Director if--

(i) the individual has been employed within the previous 2 years by--

(I) a long term care facility;

(II) a corporation that then owned or operated a long term care facility; or

(III) an association of long term care facilities;



- (ii) the individual--
 - (I) has an ownership or investment interest (represented by equity, debt, or other financial relationship) in a long term care facility or long term care service; or
 - (II) receives, or has 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; or
 - (iii) the individual, or any member of the immediate family of the individual, is subject to a conflict of interest.
- (3) The Director shall--
 - (A) serve as an effective and visible advocate on behalf of older individuals who reside in long term care facilities, within the Department of Health and Human Services and with other departments, agencies, and instrumentalities of the Federal Government regarding all Federal policies affecting such individuals;
 - (B) review and make recommendations to the Assistant Secretary regarding--
 - (i) the approval of the provisions in State plans submitted under section 307(a) that relate to State Long Term Care Ombudsman programs; and
 - (ii) the adequacy of State budgets and policies relating to the programs;
 - (C) after consultation with State Long Term Care Ombudsmen and the State agencies, make recommendations to the Assistant Secretary regarding--
 - (i) policies designed to assist State Long Term Care Ombudsmen; and
 - (ii) methods to periodically monitor and evaluate the operation of State Long Term Care Ombudsman programs, to ensure that the programs satisfy the requirements of section 307(a)(9) and section 712, including provision of service to residents of board and care facilities and of similar adult care facilities;
 - (D) keep the Assistant Secretary and the Secretary fully and currently informed about--
 - (i) problems relating to State Long Term Care Ombudsman programs; and
 - (ii) the necessity for, and the progress toward, solving the problems;
 - (E) review, and make recommendations to the Secretary and the Assistant Secretary regarding, existing and proposed Federal legislation, regulations, and policies regarding the operation of State Long Term Care Ombudsman programs;
 - (F) make recommendations to the Assistant Secretary and the Secretary regarding the policies of the Administration, and coordinate the activities of the Administration with the activities of other Federal entities, State and local entities, and non-governmental entities, relating to State Long Term Care Ombudsman programs;
 - (G) supervise the activities carried out under the authority of the Administration that relate to State Long Term Care Ombudsman programs;
 - (H) administer the National Ombudsman Resource Center established under section 202(a)(21) and make recommendations to the Assistant Secretary regarding the operation of the National Ombudsman Resource Center;
 - (I) advocate, monitor, and coordinate Federal and State activities of Long Term Care Ombudsmen under this Act;
 - (J) submit to the Speaker of the House of Representatives and the President pro tempore of the Senate an annual report on the effectiveness of services provided under section 307(a)(9) and section 712;
 - (K) have authority to investigate the operation or violation of any Federal law administered by the Department of Health and Human Services that may adversely affect the health, safety, welfare, or rights of older individuals; and
 - (L) not later than 180 days after the date of the enactment of the Older Americans Act Amendments of 1992, establish standards applicable to the training required by section 712(h)(4).

THE NATIONAL LONG TERM CARE OMBUDSMAN RESOURCE CENTER

Older Americans Act Language

Section 202. (a) It shall be the duty and function of the Administration to--

- (18)(A) establish and operate the National Ombudsman Resource Center (in this paragraph referred to as the "Center"), under the administration of the Director of the Office of Long Term Care Ombudsman Programs, that will--
 - (i) by grant or contract--
 - (I) conduct research;
 - (II) provide training, technical assistance, and information to State Long Term Care Ombudsmen;
 - (III) analyze laws, regulations, programs, and practices; and
 - (IV) provide assistance in recruiting and retaining volunteers for State Long Term Care Ombudsman programs by establishing a national program for recruitment efforts that utilizes the organizations that have established a successful record in recruiting and retaining volunteers for Ombudsman or other programs;
- relating to Federal, State, and local long Term Care Ombudsman policies; and



- (ii) assist State Long Term Care Ombudsmen in the implementation of State Long Term Care Ombudsman programs; and
- (B) make available to the Center not less than the amount of resources made available to the Long Term Care Ombudsman National Resource Center for fiscal year 2000;

ANNUAL OMBUDSMAN REPORT TO CONGRESS AND OTHERS

Older Americans Act Language

Sec. 207. (b)(1) Not later than March 1 of each year, the Assistant Secretary shall compile a report--

(A) summarizing and analyzing the data collected under titles III and VII in accordance with section 712(c) for the then most recently concluded fiscal year;

(B) identifying significant problems and issues revealed by such data (with special emphasis on problems relating to quality of care and residents' rights);

(C) discussing current issues concerning the long Term Care Ombudsman programs of the States; and

(D) making recommendations regarding legislation and administrative actions to resolve such problems.

(2) The Assistant Secretary shall submit the report required by paragraph (1) to--

(A) the Select Committee on Aging of the House of Representatives;

(B) the Special Committee on Aging of the Senate;

(C) the Committee on Education and Labor of the House of Representatives; and

(D) the Committee on Labor and Human Resources of the Senate.

(3) The Assistant Secretary shall provide the report required by paragraph (1), and make the State reports required under titles III and VII in accordance with section 712(h)(1) available, to--

(A) the Administrator of the Health Care Financing Administration;

(B) the Office of the Inspector General of the Department of Health and Human Services;

(C) the Office of Civil Rights of the Department of Health and Human Services;

(D) the Secretary of Veterans Affairs; and

(E) each public agency or private organization designated as an Office of the State Long Term Care Ombudsman under title III or VII in accordance with section 712(a)(4)(A).

AOA-IM-03-01

ATTACHMENT: SELECTED PROVISIONS OF THE PRIVACY RULE

SECTION 164.502(G), PERSONAL REPRESENTATIVE

(1) Standard: Personal representatives. As specified in this paragraph, a covered entity must, except as provided in paragraphs (g)(3) and (g)(5) of this section, treat a personal representative as the individual for purposes of this subchapter.

(2) Implementation specification: adults and emancipated minors. If under applicable law a person has authority to act on behalf of an individual who is an adult or an emancipated minor in making decisions related to health care, a covered entity must treat such person as a personal representative under this subchapter, with respect to protected health information relevant to such personal representation.

(3) Implementation specification: unemancipated minors.... (does not pertain)

(4) Implementation specification: Deceased individuals. If under applicable law an executor, administrator, or other person has authority to act on behalf of a deceased individual or of the individual's estate, a covered entity must treat such person as a personal representative under this subchapter, with respect to protected health information relevant to such personal representation.

(5) Implementation specification: Abuse, neglect, endangerment situations. Notwithstanding a state law or any requirement of this paragraph to the contrary, a covered entity may elect not to treat a person as the personal representative of an individual if: (i) The covered entity has a reasonable belief that: (A) The individual has been or may be subjected to domestic violence, abuse, or neglect by such person; or (B) Treating such person as the personal representative could endanger the individual; and (ii) The covered entity, in the exercise of professional judgment, decides that it is not in the best interest of the individual to treat the person as the individual's personal representative.

SECTION 164.508, AUTHORIZATION REQUIREMENTS

Uses and disclosures for which an authorization is required.

(a) Standard: Authorizations for uses and disclosures.

(1) Authorization required: General rule. Except as otherwise permitted or required by this subchapter, a covered entity may not use or disclose protected health information without an authorization that is valid under this section. When a covered entity obtains or receives a valid authorization for its use or disclosure of protected health information, such use or disclosure must be consistent with such authorization.

Documentation required for authorization is specified in Section 164.508 (c):

(1)....A valid authorization under this section must contain at least the following elements:

(i) A description of the information to be used or disclosed that identifies the information in a specific and meaningful fashion;

(ii) The name or other specific identification of the person(s), or class of persons, authorized to make the requested use or disclosure;

(iii) The name or other specific identification of the person(s), or class of persons, to whom the covered entity may make the requested use or disclosure;

(iv) An expiration date or an expiration event that relates to the individual or the purpose of the use or disclosure;

(v) A statement of the individual's right to revoke the authorization in writing and the exceptions to the right to revoke, together with a description of how the individual may revoke the authorization;

(vi) A statement that information used or disclosed pursuant to the authorization may be subject to redisclosure by the recipient and no longer be protected by this rule;

(vii) Signature of the individual and date; and

(viii) If the authorization is signed by a personal representative of the individual, a description of such representative's authority to act for the individual.

(2) Plain language requirement. The authorization must be written in plain language.

SECTION 164.510, USES AND DISCLOSURES REQUIRING AN OPPORTUNITY FOR THE INDIVIDUAL TO AGREE OR TO OBJECT

A covered entity may use or disclose protected health information without the written consent or authorization of the individual as described by Secs. 164.506 and 164.508, respectively, provided that the individual is informed in advance of the use or disclosure and has the opportunity to agree to or prohibit or restrict the disclosure in accordance with the applicable requirements of this section. The covered entity may orally inform the individual of and obtain the individual's oral agreement or objection to a use or disclosure permitted by this section.





(a) Standard: use and disclosure for facility directories.

(1) Permitted uses and disclosure. Except when an objection is expressed in accordance with paragraphs (a)(2) or (3) of this section, a covered health care provider may:

(i) Use the following protected health information to maintain a directory of individuals in its facility: (A) The individual's name; (B) The individual's location in the covered health care provider's facility; (C) The individual's condition described in general terms that does not communicate specific medical information about the individual; and (D) The individual's religious affiliation; and

(ii) Disclose for directory purposes such information: (A) To members of the clergy; or [[Page 82813]] (B) Except for religious affiliation, to other persons who ask for the individual by name.

(2) Opportunity to object. A covered health care provider must inform an individual of the protected health information that it may include in a directory and the persons to whom it may disclose such information (including disclosures to clergy of information regarding religious affiliation) and provide the individual with the opportunity to restrict or prohibit some or all of the uses or disclosures permitted by paragraph (a)(1) of this section.

(3) Emergency circumstances. (i) If the opportunity to object to uses or disclosures required by paragraph (a)(2) of this section cannot practically be provided because of the individual's incapacity or an emergency treatment circumstance, a covered health care provider may use or disclose some or all of the protected health information permitted by paragraph (a)(1) of this section for the facility's directory, if such disclosure is: (A) Consistent with a prior expressed preference of the individual, if any, that is known to the covered health care provider; and (B) In the individual's best interest as determined by the covered health care provider, in the exercise of professional judgment. (ii) The covered health care provider must inform the individual and provide an opportunity to object to uses or disclosures for directory purposes as required by paragraph (a)(2) of this section when it becomes practicable to do so.

(b) Standard: uses and disclosures for involvement in the individual's care and notification purposes.

(1) Permitted uses and disclosures.

(i) A covered entity may, in accordance with paragraphs (b)(2) or (3) of this section, disclose to a family member, other relative, or a close personal friend of the individual, or any other person identified by the individual, the protected health information directly relevant to such person's involvement with the individual's care or payment related to the individual's health care.

(ii) A covered entity may use or disclose protected health information to notify, or assist in the notification of (including identifying or locating), a family member, a personal representative of the individual, or another person responsible for the care of the individual of the individual's location, general condition, or death. Any such use or disclosure of protected health information for such notification purposes must be in accordance with paragraphs (b)(2), (3), or (4) of this section, as applicable.

(2) Uses and disclosures with the individual present. If the individual is present for, or otherwise available prior to, a use or disclosure permitted by paragraph (b)(1) of this section and has the capacity to make health care decisions, the covered entity may use or disclose the protected health information if it:

(i) Obtains the individual's agreement;

(ii) Provides the individual with the opportunity to object to the disclosure, and the individual does not express an objection; or

(iii) Reasonably infers from the circumstances, based on the exercise of professional judgment, that the individual does not object to the disclosure.

(3) Limited uses and disclosures when the individual is not present. If the individual is not present for, or the opportunity to agree or object to the use or disclosure cannot practically be provided because of the individual's incapacity or an emergency circumstance, the covered entity may, in the exercise of professional judgment, determine whether the disclosure is in the best interests of the individual and, if so, disclose only the protected health information that is directly relevant to the person's involvement with the individual's health care. A covered entity may use professional judgment and its experience with common practice to make reasonable inferences of the individual's best interest in allowing a person to act on behalf of the individual to pick up filled prescriptions, medical supplies, X-rays, or other similar forms of protected health information.

(4) Use and disclosures for disaster relief purposes. A covered entity may use or disclose protected health information to a public or private entity authorized by law or by its charter to assist in disaster relief efforts, for the purpose of coordinating with such entities the uses or disclosures permitted by paragraph (b)(1)(ii) of this section. The requirements in paragraphs (b)(2) and (3) of this section apply to such uses and disclosure to the extent that the covered entity, in the exercise of professional judgment, determines that the requirements do not interfere with the ability to respond to the emergency circumstances.

SECTION 164.512 USES AND DISCLOSURES FOR WHICH CONSENT, AN AUTHORIZATION, OR OPPORTUNITY TO AGREE OR OBJECT IS NOT REQUIRED.

A covered entity may use or disclose protected health information without the written consent or authorization of the individual as described in Secs. 164.506 and 164.508, respectively, or the opportunity for the individual to agree or object as



described in Sec. 164.510, in the situations covered by this section, subject to the applicable requirements of this section. When the covered entity is required by this section to inform the individual of, or when the individual may agree to, a use or disclosure permitted by this section, the covered entity's information and the individual's agreement may be given orally.

(a) Standard: Uses and disclosures required by law.

(1) A covered entity may use or disclose protected health information to the extent that such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law.

(2) A covered entity must meet the requirements described in paragraph (c), (e), or (f) of this section for uses or disclosures required by law.

(b) Standard: uses and disclosures for public health activities....

(c) Standard: Disclosures about victims of abuse, neglect or domestic violence.

(1) Permitted disclosures. Except for reports of child abuse or neglect permitted by paragraph (b)(1)(ii) of this section, a covered entity may disclose protected health information about an individual whom the covered entity reasonably believes to be a victim of abuse, neglect, or domestic violence to a government authority, including a social service or protective services agency, authorized by law to receive reports of such abuse, neglect, or domestic violence:

(i) To the extent the disclosure is required by law and the disclosure complies with and is limited to the relevant requirements of such law;

(ii) If the individual agrees to the disclosure; or

(iii) To the extent the disclosure is expressly authorized by statute or regulation and:

(A) The covered entity, in the exercise of professional judgment, believes the disclosure is necessary to prevent serious harm to the individual or other potential victims; or

(B) If the individual is unable to agree because of incapacity, a law enforcement or other public official authorized to receive the report represents that the protected health information for which disclosure is sought is not intended to be used against the individual and that an immediate enforcement activity that depends upon the disclosure would be materially and adversely affected by waiting until the individual is able to agree to the disclosure.

(2) Informing the individual. A covered entity that makes a disclosure permitted by paragraph (c)(1) of this section must promptly inform the individual that such a report has been or will be made, except if:

(i) The covered entity, in the exercise of professional judgment, believes informing the individual would place the individual at risk of serious harm; or

(ii) The covered entity would be informing a personal representative, and the covered entity reasonably believes the personal representative is responsible for the abuse, neglect, or other injury, and that informing such person would not be in the best interests of the individual as determined by the covered entity, in the exercise of professional judgment.

(d) Standard: Uses and disclosures for health oversight activities.

(1) Permitted disclosures. A covered entity may disclose protected health information to a health oversight agency for oversight activities authorized by law, including audits; civil, administrative,

or criminal investigations; inspections; licensure or disciplinary actions; civil, administrative, or criminal proceedings or actions; or other activities necessary for appropriate oversight of:

(i) The health care system;

(ii) Government benefit programs for which health information is relevant to beneficiary eligibility;

(iii) Entities subject to government regulatory programs for which health information is necessary for determining compliance with program standards; or

(iv) Entities subject to civil rights laws for which health information is necessary for determining compliance.

(2) Exception to health oversight activities. For the purpose of the disclosures permitted by paragraph (d)(1) of this section, a health oversight activity does not include an investigation or other activity in which the individual is the subject of the investigation or activity and such investigation or other activity does not arise out of and is not directly related to:

(i) The receipt of health care;

(ii) A claim for public benefits related to health; or

(iii) Qualification for, or receipt of, public benefits or services when a patient's health is integral to the claim for public benefits or services.

(3) Joint activities or investigations. Notwithstanding paragraph (d)(2) of this section, if a health oversight activity or investigation is conducted in conjunction with an oversight activity or investigation

relating to a claim for public benefits not related to health, the joint activity or investigation is considered a health oversight activity for purposes of paragraph (d) of this section.

(4) Permitted uses. If a covered entity also is a health oversight agency, the covered entity may use protected health information for health oversight activities as permitted by paragraph (d) of this



section.

(e) Standard: Disclosures for judicial and administrative proceedings.

(1) Permitted disclosures. A covered entity may disclose protected health information in the course of any judicial or administrative proceeding:

(i) In response to an order of a court or administrative tribunal, provided that the covered entity discloses only the protected health information expressly authorized by such order; or

(ii) In response to a subpoena, discovery request, or other lawful process, that is not accompanied by an order of a court or administrative tribunal, if:

(A) The covered entity receives satisfactory assurance, as described in paragraph (e)(1)(iii) of this section, from the party seeking the information that reasonable efforts have been made by such party to ensure that the individual who is the subject of the protected health information that has been requested has been given notice of the request; or

(B) The covered entity receives satisfactory assurance, as described in paragraph (e)(1)(iv) of this section, from the party seeking the information that reasonable efforts have been made by such party to secure a qualified protective order that meets the requirements of paragraph (e)(1)(v) of this section.

(iii) For the purposes of paragraph (e)(1)(ii)(A) of this section, a covered entity receives satisfactory assurances from a party seeking protected health information if the covered entity receives from such party a written statement and accompanying documentation demonstrating that:

(A) The party requesting such information has made a good faith attempt to provide written notice to the individual (or, if the individual's location is unknown, to mail a notice to the individual's last known address);

(B) The notice included sufficient information about the litigation or proceeding in which the protected health information is requested to permit the individual to raise an objection to the court or administrative tribunal; and

(C) The time for the individual to raise objections to the court or administrative tribunal has elapsed, and:

(1) No objections were filed; or

(2) All objections filed by the individual have been resolved by the court or the administrative tribunal and the disclosures being sought are consistent with such resolution.

(iv) For the purposes of paragraph (e)(1)(ii)(B) of this section, a covered entity receives satisfactory assurances from a party seeking protected health information, if the covered entity receives from such party a written statement and accompanying documentation demonstrating that:

(A) The parties to the dispute giving rise to the request for information have agreed to a qualified protective order and have presented it to the court or administrative tribunal with jurisdiction over the dispute; or

(B) The party seeking the protected health information has requested a qualified protective order from such court or administrative tribunal.

(v) For purposes of paragraph (e)(1) of this section, a qualified protective order means, with respect to protected health information requested under paragraph (e)(1)(ii) of this section, an order of a court or of an administrative tribunal or a stipulation by the parties to the litigation or administrative proceeding that:

(A) Prohibits the parties from using or disclosing the protected health information for any purpose other than the litigation or proceeding for which such information was requested; and

(B) Requires the return to the covered entity or destruction of the protected health information (including all copies made) at the end of the litigation or proceeding.

(vi) Notwithstanding paragraph (e)(1)(ii) of this section, a covered entity may disclose protected health information in response to lawful process described in paragraph (e)(1)(ii) of this section without receiving satisfactory assurance under paragraph (e)(1)(ii)(A) or (B) of this section, if the covered entity makes reasonable efforts to provide notice to the individual sufficient to meet the requirements of paragraph (e)(1)(iii) of this section or to seek a qualified protective order sufficient to meet the requirements of paragraph (e)(1)(iv) of this section.

(2) Other uses and disclosures under this section. The provisions of this paragraph do not supersede other provisions of this section that otherwise permit or restrict uses or disclosures of protected health information.

(f) Standard: Disclosures for law enforcement purposes. A covered entity may disclose protected health information for a law enforcement purpose to a law enforcement official if the conditions in paragraphs (f)(1) through (f)(6) of this section are met, as applicable.

(1) Permitted disclosures: Pursuant to process and as otherwise required by law. A covered entity may disclose protected health information:

(i) As required by law including laws that require the reporting of certain types of wounds or other physical injuries, except for laws subject to paragraph (b)(1)(ii) or (c)(1)(i) of this section; or

(ii) In compliance with and as limited by the relevant requirements of:

(A) A court order or court-ordered warrant, or a subpoena or summons issued by a judicial officer;

(B) A grand jury subpoena; or

(C) An administrative request, including an administrative subpoena or summons, a civil or an authorized investigative demand, or similar process authorized under law, provided that:

(1) The information sought is relevant and material to a legitimate law enforcement inquiry;

(2) The request is specific and limited in scope to the extent reasonably practicable in light of the purpose for which the information is sought; and

(3) De-identified information could not reasonably be used.

(2) Permitted disclosures: Limited information for identification and location purposes. Except for disclosures required by law as permitted by paragraph (f)(1) of this section, a covered entity may

disclose protected health information in response to a law enforcement official's request for such information for the purpose of identifying or locating a suspect, fugitive, material witness, or missing person, provided that:

(i) The covered entity may disclose only the following information:

(A) Name and address; (B) Date and place of birth; (C) Social security number; (D) ABO blood type and rh factor; (E) Type of injury; (F) Date and time of treatment; (G) Date and time of death, if applicable; and (H) A description of distinguishing physical characteristics, including height, weight, gender, race, hair and eye color, presence or absence of facial hair (beard or moustache), scars, and tattoos.

(ii) Except as permitted by paragraph (f)(2)(i) of this section, the covered entity may not disclose for the purposes of identification or location under paragraph (f)(2) of this section any protected health information related to the individual's DNA or DNA analysis, dental records, or typing, samples or analysis of body fluids or tissue.

(3) Permitted disclosure: Victims of a crime. Except for disclosures required by law as permitted by paragraph (f)(1) of this section, a covered entity may disclose protected health information in response to a law enforcement official's request for such information about an individual who is or is suspected to be a victim of a crime, other than disclosures that are subject to paragraph (b) or (c) of this

section, if:

(ii) The individual agrees to the disclosure; or

(iii) The covered entity is unable to obtain the individual's agreement because of incapacity or other emergency circumstance, provided that:

(A) The law enforcement official represents that such information is needed to determine whether a violation of law by a person other than the victim has occurred, and such information is not intended to be used against the victim;

(B) The law enforcement official represents that immediate law enforcement activity that depends upon the disclosure would be materially and adversely affected by waiting until the individual is able to agree to the disclosure; and

(C) The disclosure is in the best interests of the individual as determined by the covered entity, in the exercise of professional judgment.

(4) Permitted disclosure: Decedents. A covered entity may disclose protected health information about an individual who has died to a law enforcement official for the purpose of alerting law enforcement of the death of the individual if the covered entity has a suspicion that such death may have resulted from criminal conduct.

(5) Permitted disclosure: Crime on premises. A covered entity may disclose to a law enforcement official protected health information that the covered entity believes in good faith constitutes evidence of criminal conduct that occurred on the premises of the covered entity.

(6) Permitted disclosure: Reporting crime in emergencies.

(i) A covered health care provider providing emergency health care in response to a medical emergency, other than such emergency on the premises of the covered health care provider, may disclose protected health information to a law enforcement official if such disclosure appears necessary to alert law enforcement to: (A) The commission and nature of a crime; (B) The location of such crime or of the victim(s) of such crime; and (C) The identity, description, and location of the perpetrator of such crime.

(ii) If a covered health care provider believes that the medical emergency described in paragraph (f)(6)(i) of this section is the result of abuse, neglect, or domestic violence of the individual in need of emergency health care, paragraph (f)(6)(i) of this section does not apply and any disclosure to a law enforcement official for law enforcement purposes is subject to paragraph (c) of this section.

(g) Standard: Uses and disclosures about decedents.

(1) Coroners and medical examiners. A covered entity may disclose protected health information to a coroner or medical examiner for the purpose of identifying a deceased person, determining a cause of death, or other duties as authorized by law. A covered entity that also performs the duties of a coroner or medical examiner may use protected health information for the purposes described in this paragraph.

(2) Funeral directors. A covered entity may disclose protected health information to funeral directors, consistent with applicable law, as necessary to carry out their duties with respect to the





decedent. If necessary for funeral directors carry out their duties, the covered entity may disclose the protected health information prior to, and in reasonable anticipation of, the individual's death.

(h) Standard: Uses and disclosures for cadaveric organ, eye or tissue donation purposes. ...

(i) Standard: Uses and disclosures for research purposes....

(j) Standard: Uses and disclosures to avert a serious threat to health or safety....

(k) Standard: Uses and disclosures for specialized government functions....

SECTION 164.532, TRANSITION PROVISIONS

(a) Standard: Effect of prior consents and authorizations. Notwithstanding other sections of this subpart, a covered entity may continue to use or disclose protected health information pursuant to a consent, authorization, or other express legal permission obtained from an individual permitting the use or disclosure of protected health information that does not comply with Secs. 164.506 or 164.508 of this subpart consistent with paragraph (b) of this section.

(b) Implementation specification: Requirements for retaining effectiveness of prior consents and authorizations. Notwithstanding other sections of this subpart, the following provisions apply to use or disclosure by a covered entity of protected health information pursuant to a consent, authorization, or other express legal permission obtained from an individual permitting the use or disclosure of protected health information, if the consent, authorization, or other express legal permission was obtained from an individual before the applicable compliance date of this subpart and does not comply with Secs. 164.506 or 164.508 of this subpart.

(1) If the consent, authorization, or other express legal permission obtained from an individual permits a use or disclosure for purposes of carrying out treatment, payment, or health care operations, the covered entity may, with respect to protected health information that it created or received before the applicable compliance date of this subpart and to which the consent, authorization, or other express legal permission obtained from an individual applies, use or disclose such information for purposes of carrying out treatment, payment, or health care operations, provided that: (i) The covered entity does not make any use or disclosure that is expressly excluded from the a consent, authorization, or other express legal permission obtained from an individual; and (ii) The covered entity complies with all limitations placed by the consent, authorization, or other express legal permission obtained from an individual.

(2) If the consent, authorization, or other express legal permission obtained from an individual specifically permits a use or disclosure for a purpose other than to carry out treatment, payment, or health care operations, the covered entity may, with respect to protected health information that it created or received before the applicable compliance date of this subpart and to which the consent, authorization, or other express legal permission obtained from an individual applies, make such use or disclosure, provided that: (i) The covered entity does not make any use or disclosure that is expressly excluded from the consent, authorization, or other express legal permission obtained from an individual; and (ii) The covered entity complies with all limitations placed by the consent, authorization, or other express legal permission obtained from an individual.

(3) In the case of a consent, authorization, or other express legal permission obtained from an individual that identifies a specific research project that includes treatment of individuals: (i) If the consent, authorization, or other express legal permission obtained from an individual specifically permits a use or disclosure for purposes of the project, the covered entity may, with respect to protected health information that it created or received either before or after the applicable compliance date of this subpart and to which the consent or authorization applies, make such use or disclosure for purposes of that project, provided that the covered entity complies with all limitations placed by the consent, authorization, or other express legal permission obtained from an individual. (ii) If the consent, authorization, or other express legal permission obtained from an individual is a general consent to participate in the project, and a covered entity is conducting or participating in the research, such covered entity may, with respect to protected health information that it created or received as part of the project before or after the applicable compliance date of this subpart, make a use or disclosure for purposes of that project, provided that the covered entity complies with all limitations placed by the consent, authorization, or other express legal permission obtained from an individual.

(4) If, after the applicable compliance date of this subpart, a covered entity agrees to a restriction requested by an individual under Sec. 164.522(a), a subsequent use or disclosure of protected health information that is subject to the restriction based on a consent, authorization, or other express legal permission obtained from an individual as given effect by paragraph (b) of this section, must comply with such restriction.

New York State Consolidated Laws

NEW YORK STATE CONSOLIDATED LAWS CHAPTER 18. EXECUTIVE LAW ARTICLE 19-J. OFFICE FOR THE AGING

SECTION 544-A. LONG TERM CARE OMBUDSMAN.

1. Definitions. For the purposes of this section, the following terms shall have the following meanings:

- (a) "Local ombudsman" shall mean an individual who is employed by the local entity designated pursuant to subdivision four of this section and who has been approved by the state ombudsman to perform or carry out the activities of the local long term care ombudsman program. The local ombudsman may be either a paid employee or volunteer of the local entity.
- (b) "Long term care facilities"* shall mean residential health care facilities as defined in subdivision three of section twenty-eight hundred one of the public health law and adult care facilities as defined in subdivision twenty-one of section two of the social services law. Within the amounts appropriated therefore, "long term care facilities" shall also mean managed long term care plans and approved managed long term care or operating demonstrations as defined in section forty-four hundred three-f of the public health law and the term "resident", "residents", "patient" and "patients" shall also include enrollees of such plans.

* NB Effective until December 31, 2006

* (b) "Long term care facilities" shall mean residential health care facilities as defined in subdivision three of section twenty-eight hundred one of the public health law and adult care facilities as defined in subdivision twenty-one of section two of the social services law.

* NB Effective December 31, 2006

(c) "State ombudsman" shall mean the state long term care ombudsman appointed by the director pursuant to subdivision three of this section.

2. Office established. There is hereby established within the office for the aging an office of the state long term care ombudsman for the purpose of receiving and resolving complaints affecting applicants, patients and residents in long term care facilities and, where appropriate, referring complaints to appropriate investigatory agencies and acting in concert with such agencies.

3. State long term care ombudsman.

- (a) The director shall appoint a full-time state long term care ombudsman to administer and supervise the office of the state long term care ombudsman.
- (b) The state ombudsman shall be selected from among individuals with expertise and experience in the fields of long term care and advocacy, and with other qualifications determined by the director to be appropriate for the position.
- (c) The state ombudsman shall, personally or through authorized representatives as provided for in paragraph
- (d) of this subdivision:
 - (i) identify, investigate and resolve complaints that are made by, or on behalf of, long term care residents in this state and that relate to actions, inactions or decisions that may adversely affect the health, safety and welfare or rights of such residents; provided, however, that the state ombudsman shall immediately refer to the appropriate investigatory agency information obtained during the investigation of a complaint which suggests the possible occurrence of physical abuse, mistreatment or neglect or Medicaid fraud, in accordance with procedures established by the state ombudsman. Such procedures shall include, but not be limited to, the reporting to the appropriate investigatory agency any reasonable information which suggests the possible occurrence of physical abuse, mistreatment or neglect as defined in section twenty-eight hundred three-d of the public health law. Nothing in this section shall be construed as authorizing the state ombudsman to impose a resolution unacceptable to either party involved in a complaint or to assume powers delegated to the commissioner of health or the department of health pursuant to article twenty-eight of the public health law or to the commissioner of social services or the department of social services pursuant to the social services





law; nor does it authorize the state ombudsman to investigate final administrative determinations made pursuant to law by such commissioners if such decisions become the subject of complaints to the state ombudsman;

- (ii) provide services to assist residents in protecting their health, safety, welfare and rights, including but not limited to representing the interests of residents before governmental agencies and seeking appropriate administrative, legal and other remedies to protect their welfare, safety, health and rights;
- (iii) inform the residents about means of obtaining services provided by public health and social services or other public agencies;
- (iv) analyze and monitor the development and implementation of federal, state and local laws, regulations or policies with respect to the adequacy of long term care facilities and services in the state;
- (v) in consultation with the director, establish procedures for the training of the authorized representatives and of local ombudsmen and their staff which at a minimum shall specify the minimum hours of training and the content of the training, including, but not limited to, training relating to federal, state and local laws, regulations and policies with respect to long term care facilities in the state; and
- (vi) carry out such other activities as the director determines to be appropriate pursuant to the Older Americans Act and other applicable federal and state laws and related regulations as may, from time to time, be amended.

- (d) (i) The state ombudsman, with the approval of the director, may appoint one or more authorized representatives to assist the state ombudsman in the performance of his or her duties under this section.
- (ii) The state ombudsman shall appoint only those individuals who have been certified as having completed the training program developed pursuant to paragraph (c) of this subdivision.
- (e) No state ombudsman, authorized representative, local ombudsman or immediate family member of such person shall:
 - (i) 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;
 - (ii) 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;
 - (iii) be employed by, or participate in the management of, a long term care facility; and
 - (iv) receive remuneration (in cash or in kind) under a compensation arrangement with an owner or operator of a long term care facility.
- (f) The state ombudsman shall establish written procedures to identify and remove conflicts of interest set out in paragraph (e) of this subdivision and shall include actions that the director may require an individual ombudsman or immediate family member to take to remove such conflicts of interest.
- (g) Within the amounts appropriated therefore, the state ombudsman program shall include services specifically designed to serve persons enrolled in managed long term care plans or approved managed long term care or operating demonstrations authorized under section forty-four hundred three-f of the public health law, and shall also review and respond to complaints relating to marketing practices by such plans and demonstrations.*

* NB Repealed December 31, 2006

4. Local long term care ombudsman program.

- (a) The state ombudsman, with the approval of the director, may designate an entity to operate a local long term care ombudsman program for one or more counties.
- (b) The designated entity shall be an area agency on aging, a public agency or a private not-for-profit corporation which is neither a provider or regulator of long term care facilities, or an affiliate or unit of such agency or corporation.
- (c)
 - (i) Each local long term care ombudsman program shall be directed by a qualified individual who is employed and paid by the local entity and who shall have the duties and responsibilities as provided in regulations, consistent with the provisions of this section and of Title VII of the Federal Older Americans Act, as amended. In addition, upon designation, the entity is responsible for providing for adequate and qualified staff, which may include trained volunteers to perform the functions of the local long term care ombudsman program.
 - (ii) No local program staff, including the supervisor and any volunteers, shall perform or carry out the activities on behalf of the local long term care ombudsman program unless such staff has received the training pursuant to paragraph (c) of subdivision three of this section and has been approved by the state ombudsman as qualified to carry out the activities on behalf of the local program.

(d) The director, in consultation with the state ombudsman, shall establish in regulations standards for the operation of a local long term care ombudsman program.

(e) When the state ombudsman determines that a local long term care ombudsman program does not meet the standards set forth in this section and in any related regulations, the state ombudsman shall with the approval of the director withdraw the designation of the local program.

Prior to taking such action, the state ombudsman shall send to the affected local program a notice of intention to withdraw the designation, which notice shall also inform the local program of its right to an administrative hearing prior to the director's final determination. Such administrative hearing shall be conducted in accordance with procedures set forth in regulations.

5. Review of complaint.

(a) Upon receipt of a complaint, the ombudsman shall determine immediately whether there are reasonable grounds for an investigation. Such investigation shall be conducted in a manner prescribed in regulations. The state ombudsman, or the local ombudsman, whoever is appropriate, shall immediately refer to the appropriate investigatory agency information obtained during the investigation of a complaint which suggests the possible occurrence of physical abuse, mistreatment or neglect or Medicaid fraud, in accordance with procedures established by the state ombudsman. Such procedures shall include, but not be limited to, the reporting to the appropriate investigatory agency if there is reasonable cause to believe the occurrence of physical abuse, mistreatment or neglect as defined in section twenty-eight hundred three-d of the public health law.

(b) If the referral is made by the local ombudsman, a copy of the referral, together with copies of any relevant information or records, shall be sent forthwith to the state ombudsman.

6. Retaliatory discrimination prohibited.

(a) No person shall discriminate against any resident of a long term care facility because

such resident or any person acting on behalf of the resident has brought or caused to be brought any complaint to the state or local long term care ombudsman for investigation, or against any resident or employee of a long term care facility or any other person because such resident or employee or any other person has given or provided or is to give or provide any statements, testimony, other evidence or cooperation for the purposes of any such complaint.

(b) Any resident who has reason to believe that he or she may have been discriminated against in violation of this subdivision may, within thirty days after such alleged violation occurs, file a complaint with the commissioner of health pursuant to subdivision ten of section twenty-eight hundred one-d of the public health law.

7. Record access.

(a)

(i) The state ombudsman, with the approval of the director, may approve and certify one or more previously designated local ombudsmen or state representatives as a records access ombudsman upon their having completed the training program for records access ombudsman set out in paragraph (b) of this subdivision; and

(ii) A records access ombudsman shall be an employee of the office of the state ombudsman or of the local entity designated to carry out a local ombudsman program, except that the state ombudsman may certify as a records access ombudsman a volunteer under the direct supervision of the state ombudsman or of the supervisor of the local program, whichever is appropriate, if such volunteer is licensed or certified in a medical, legal, or social work profession, or whose experience and training demonstrate equivalent competency in medical and personal records review.

(b) Except as otherwise provided by law, no person, including the state ombudsman, his or her authorized representatives, or any local ombudsman, shall be authorized to have access to or review the medical or personal records of a patient or resident pursuant to section twenty-eight hundred three-c of the public health law and section four hundred sixty-one-a of the social services law or pursuant to written consent to such access by the patient or resident, or his or her legal representative unless such person has been:

(i) Certified as having satisfactorily completed a training program prescribed by the office and designed, among other purposes, to (A) impress upon the participant the value, purpose, and confidentiality of medical and personal records, (B) familiarize the participant with the operational aspects of long term care facilities, and (C) deal with the medical and psycho-social needs of patients or residents in such facilities; and

(ii) Certified as a records access ombudsman by the state ombudsman.





- (c) No ombudsman shall disclose the identity of the resident or complainant that made a complaint to the ombudsman unless:
 - (i) the complainant or resident or his or her legal representative gives written consent to the ombudsman, except that written consent shall also include the resident or complainant giving oral consent that is documented contemporaneously in a writing made by the ombudsman with the agreement of the complainant or resident and in accordance with requirements established by the director; or
 - (ii) pursuant to a court order.
- (d) No ombudsman shall disclose to any person outside of the ombudsman program any information obtained from a patient's or resident's records without the approval of the state ombudsman or his or her designee, in accordance with procedures for disclosure established by the director in consultation with the state ombudsman. Such approval is not required for suspected instances of physical abuse, mistreatment or neglect or Medicaid fraud and, subject to withholding identifying information of a non-consenting complainant or resident under paragraph (c) of this subdivision, a local ombudsman or state representative shall provide needed file information to the appropriate state and federal regulatory authorities and cooperate with them to help further their investigation.
- (e) No records access or other ombudsman who directly or indirectly obtains access to a patient's or resident's medical or personal records pursuant to section twenty-eight hundred three-c of the public health law shall disclose to such patient or resident or to any other person outside of the ombudsman program the content of any such records to which such patient, resident or other person had not previously had the right of access, provided that this restriction shall not prevent such ombudsman from advising such patient or resident of the status or progress of an investigation or complaint process initiated at the request of such patient or resident or from referring such complaint, together with the relevant records, to appropriate investigatory agencies. Any person who intentionally violates the provisions of this subdivision shall be guilty of a misdemeanor. Nothing contained in this section shall be construed to limit or abridge any right of access to records, including financial records, otherwise available to ombudsmen, patients or residents, or any other person.

8. Failure to cooperate. Any long term care facility which refuses to permit the state ombudsman, his or her authorized representative, or any local ombudsman entry into such facility or refuses to cooperate with the state ombudsman, his or her authorized representative, or any local ombudsman in the carrying out of their mandated duties and responsibilities set forth in this section and any regulations promulgated pursuant thereto, or refuses to permit patients or staff to communicate freely and privately with the state ombudsman, his or her authorized representative, or any local ombudsman shall be subject to the appropriate sanction or penalties of the state agency that licenses the facility.

9. Civil immunity. Notwithstanding any other provision of law, ombudsmen designated under this section or who are also records access ombudsmen functioning in accordance with this section shall be included within the definition of employee as set forth in section seventeen of the public officers law and shall be defended and indemnified in accordance with the provisions of article two of such law.

10. Regulations. The director is authorized to promulgate regulations to implement the provisions of this section.

11. Annual report. On or before March thirty-first, nineteen hundred ninety-six, and annually thereafter, the state ombudsman shall submit to the governor, commissioner of the administration on aging, speaker of the assembly, temporary president of the senate, director of the state office for the aging, commissioner of the department of health, and the commissioner of the department of social services a report and make such report available to the public:

- (a) describing the activities carried out by the office of the state long term care ombudsman during the prior calendar year;
- (b) containing and analyzing data relating to complaints and conditions in long term care facilities and to residents for the purpose of identifying and resolving significant problems;
- (c) evaluating the problems experienced by, and the complaints made by or on behalf of, residents;
- (d) containing recommendations for:
 - (i) appropriate state legislation, rules and regulations and other action to improve the quality of the care and life of the residents; and
 - (ii) protecting the health, safety and welfare and rights of the residents;
- (e) any other matters as the state ombudsman, in consultation with the director, determines to be appropriate.

NEW YORK STATE CONSOLIDATED LAWS
CHAPTER 27. MENTAL HYGIENE LAW
TITLE E. GENERAL PROVISIONS
ARTICLE 81. PROCEEDINGS FOR APPOINTMENT OF
A GUARDIAN FOR PERSONAL NEEDS OR PROPERTY
MANAGEMENT

Section 81.01 Legislative findings and purpose.

81.02 Power to appoint a guardian of the person and/or property;
standard for appointment.

81.03 Definitions.

81.04 Jurisdiction.

81.05 Venue.

81.06 Who may commence a proceeding.

81.07 Notice.

81.08 Petition.

81.09 Appointment of court evaluator.

81.10 Counsel.

81.11 Hearing.

81.12 Burden and quantum of proof.

81.13 Timing of hearing.

81.14 Record of the proceedings.

81.15 Findings.

81.16 Dispositional alternatives.

81.17 Nomination of guardian.

81.18 Foreign guardian for a person not present in the state.

81.19 Eligibility as guardian.

81.20 Duties of guardian.

81.21 Powers of guardian; property management.

81.22 Powers of guardian; personal needs.

81.23 Provisional remedies.

81.24 Notice of pendency.

81.25 Filing of bond by guardian.

81.26 Designation of clerk to receive process.

81.27 Commission to guardian.

81.28 Compensation of guardian.

81.29 Effect of the appointment on the incapacitated person.

81.30 Initial report.

81.31 Annual report.

81.32 Examination of initial and annual reports.

81.33 Intermediate and final report.

81.34 Decree on filing instruments approving accounts.

81.35 Removal of guardian.

81.36 Discharge or modification of powers of guardian.

81.37 Resignation or suspension of powers of guardian.

81.38 Vacancy in office.

81.39 Guardian education requirements.





- 81.40 Court evaluator education requirements.
- 81.41 Court examiner education requirements.
- 81.42 Compliance.
- 81.44 Proceedings to discover property withheld.

S 81.01 Legislative findings and purpose.

The legislature hereby finds that the needs of persons with incapacities are as diverse and complex as they are unique to the individual. The current system of conservatorship and committee does not provide the necessary flexibility to meet these needs. Conservatorship which traditionally compromises a person's rights only with respect to property frequently is insufficient to provide necessary relief. On the other hand, a committee, with its judicial finding of incompetence and the accompanying stigma and loss of civil rights, traditionally involves a deprivation that is often excessive and unnecessary. Moreover, certain persons require some form of assistance in meeting their personal and property management needs but do not require either of these drastic remedies. The legislature finds that it is desirable for and beneficial to persons with incapacities to make available to them the least restrictive form of intervention which assists them in meeting their needs but, at the same time, permits them to exercise the independence and self-determination of which they are capable. The legislature declares that it is the purpose of this act to promote the public welfare by establishing a guardianship system which is appropriate to satisfy either personal or property management needs of an incapacitated person in a manner tailored to the individual needs of that person, which takes in account the personal wishes, preferences and desires of the person, and which affords the person the greatest amount of independence and self-determination and participation in all the decisions affecting such person's life.

S 81.02 POWER TO APPOINT A GUARDIAN OF THE PERSON AND/OR PROPERTY; STANDARD FOR APPOINTMENT.

(a) The court may appoint a guardian for a person if the court determines:

1. that the appointment is necessary to provide for the personal needs of that person, including food, clothing, shelter, health care, or safety and/or to manage the property and financial affairs of that person; and
2. that the person agrees to the appointment, or that the person is incapacitated as defined in subdivision (b) of this section. In deciding whether the appointment is necessary, the court shall consider the report of the court evaluator, as required in paragraph five of subdivision (c) of section 81.09 of this article, and the sufficiency and reliability of available resources, as defined in subdivision (e) of section 81.03 of this article, to provide for personal needs or property management without the appointment of a guardian. Any guardian appointed under this article shall be granted only those powers which are necessary to provide for personal needs and/or property management of the incapacitated person in such a manner as appropriate to the individual and which shall constitute the least restrictive form of intervention, as defined in subdivision (d) of section 81.03 of this article.

(b) The determination of incapacity shall be based on clear and convincing evidence and shall consist of a determination that a person is likely to suffer harm because:

1. the person is unable to provide for personal needs and/or property management; and
2. the person cannot adequately understand and appreciate the nature and consequences of such inability.

(c) In reaching its determination, the court shall give primary consideration to the functional level and functional limitations of the person. Such consideration shall include an assessment of that person's:

1. management of the activities of daily living, as defined in subdivision (h) of section 81.03 of this article;
2. understanding and appreciation of the nature and consequences of any inability to manage the activities of daily living;
3. preferences, wishes, and values with regard to managing the activities of daily living; and
4. the nature and extent of the person's property and financial affairs and his or her ability to manage them.

It shall also include an assessment of (i) the extent of the demands placed on the person by that person's personal needs and by the nature and extent of that person's property and financial affairs; (ii) any physical illness and the prognosis of such illness; (iii) any mental disability, as that term is defined in section 1.03 of this chapter, alcoholism or substance dependence as those terms are defined in section 19.03 of this chapter, and the prognosis of such disability, alcoholism or substance dependence; and (iv) any medications with which the person is being treated and their effect on the person's behavior, cognition and judgment.

(d) In addition, the court shall consider all other relevant facts and circumstances regarding the person's:

1. functional level; and
2. understanding and appreciation of the nature and consequences of his or her functional limitations.

S 81.03 DEFINITIONS.

When used in this article,

(a) “guardian” means a person who is eighteen years of age or older, a corporation, or a public agency, including a local department of social services, appointed in accordance with terms of this article by the supreme court, the surrogate’s court, or the county court to act on behalf of an incapacitated person in providing for personal needs and/or for property management.

(b) “functional level” means the ability to provide for personal needs and/or the ability with respect to property management.

(c) “functional limitations” means behavior or conditions of a person which impair the ability to provide for personal needs and/or property management.

(d) “least restrictive form of intervention” means that the powers granted by the court to the guardian with respect to the incapacitated person represent only those powers which are necessary to provide for that person’s personal needs and/or property management and which are consistent with affording that person the greatest amount of independence and self-determination in light of that person’s understanding and appreciation of the nature and consequences of his or her functional limitations.

(e) “available resources” means resources such as, but not limited to, visiting nurses, homemakers, home health aides, adult day care and multipurpose senior citizen centers, powers of attorney, trusts, representative and protective payees, and residential care facilities.

(f) “personal needs” means needs such as, but not limited to, food, clothing, shelter, health care, and safety.

(g) “property management” means taking actions to obtain, administer, protect, and dispose of real and personal property, intangible property, business property, benefits, and income and to deal with financial affairs.

(h) “activities of daily living” means activities such as, but not limited to, mobility, eating, toileting, dressing, grooming, housekeeping, cooking, shopping, money management, banking, driving or using public transportation, and other activities related to personal needs and to property management.

(i) “major medical or dental treatment” means a medical, surgical or diagnostic intervention or procedure where a general anesthetic is used or which involves any significant risk or any significant invasion of bodily integrity requiring an incision or producing substantial pain, discomfort, debilitation, or having a significant recovery period, or which involves the administration of psychotropic medication or electroconvulsive therapy; it does not include any routine diagnosis or treatment such as the administration of medications other than chemotherapy for non-psychiatric conditions or nutrition or the extraction of bodily fluids for analysis; dental care performed with a local anesthetic; and any procedures which are provided under emergency circumstances, pursuant to section two thousand five hundred four of the public health law.

S 81.04 JURISDICTION.

(a) If after a hearing or trial in accordance with the provisions of this article it is determined that relief under this article is necessary, the supreme court, and the county courts outside the city of New York, shall have the power to provide the relief set forth in this article:

1. for a resident of the state;
2. for a nonresident of the state present in the state;
3. for a nonresident of the state pursuant to section 81.18 of this article.

(b) Notwithstanding the provisions of subdivision (a) of this section, when it appears in any proceeding in the surrogate’s court that a person interested in an estate is entitled to money or property as a beneficiary of the estate, or entitled to the proceeds of any action as provided in section 5-4.1 of the estates, powers and trusts law, or to the proceeds of a settlement of a cause of action brought on behalf of an infant for personal injuries, and that the interested person is a resident of, or is physically present in, the county in which the proceeding is pending and is allegedly incapacitated with respect to property management under the provisions of this article, and the surrogate’s court is satisfied after a hearing or trial in accordance with the provisions of this article that the interested person is incapacitated with respect to property management, the surrogate’s court shall have the power to order relief for that person with respect to property management in accordance with the provisions of this article.

S 81.05 VENUE.

(a) A proceeding under this article shall be brought in the supreme court within the judicial district, or in the county court of the county in which the person alleged to be incapacitated resides, or is physically present, or in the surrogate’s court having jurisdiction pursuant to subdivision (b) of section 81.04 of this article. If the person alleged to be incapacitated is being cared for as a resident in a facility, hospital, or school, or an alcoholism facility in this state as those terms are defined in section 1.03 of this chapter, a substance abuse program as that term is defined in section 19.03 of this chapter, an adult care facility as that term is defined in section two of the social services law, or a residential health care facility or a general hospital as those terms are defined in section two thousand eight hundred one of the public health law, the residence of that person





shall be deemed to be in the county where the facility is located and the proceeding shall be brought in that county, subject to application by an interested party for a change in venue to another county because of the inconvenience of the parties or witnesses or the condition of the person alleged to be incapacitated. If the person alleged to be incapacitated is not present in the state, or the residence of such person cannot be ascertained, the residence shall be deemed to be in the county in which all or some of such person's property is situated.

(b) After the appointment of a temporary guardian, special guardian, standby guardian, or alternate standby guardians, any proceeding to modify a prior order shall be brought in the supreme court, county court, or surrogate's court which granted the prior order. If, at the time of the application to modify a prior order, the incapacitated person is being cared for as a resident in a facility, hospital, or school, or an alcoholism facility in this state as those terms are defined in section 1.03 of this chapter, a substance abuse program as that term is defined in section 19.03 of this chapter, an adult care facility as that term is defined in section two of the social services law, or a residential health care facility or a general hospital as those terms are defined in section two thousand eight hundred one of the public health law, the proceeding shall be brought in the county where the facility is located, subject to application by an interested party for a change in venue to the court which granted the prior order because of the inconvenience of the parties or witnesses or the condition of the incapacitated person.

S 81.06 WHO MAY COMMENCE A PROCEEDING.

(a) A proceeding under this article shall be commenced by the filing of the petition with the court by:

1. the person alleged to be incapacitated;
2. a presumptive distributee of the person alleged to be incapacitated, as that term is defined in subdivision forty-two of section one hundred three of the surrogate's court procedure act;
3. an executor or administrator of an estate when the alleged incapacitated person is or may be the beneficiary of that estate;
4. a trustee of a trust when the alleged incapacitated person is or may be the grantor or a beneficiary of that trust;
5. the person with whom the person alleged to be incapacitated resides;
6. a person otherwise concerned with the welfare of the person alleged to be incapacitated. For purposes of this section a person otherwise concerned with the welfare of the person alleged to be incapacitated may include a corporation, or a public agency, including the department of social services in the county where the person alleged to be incapacitated resides regardless of whether the person alleged to be incapacitated is a recipient of public assistance;
7. the chief executive officer of a facility, hospital, school, or an alcoholism facility in this state as those terms are defined in section 1.03 of this chapter, a substance abuse program as that term is defined in section 19.03 of this chapter, an adult care facility as that term is defined in section two of the social services law, or a residential health care facility or a general hospital as those terms are defined in section two thousand eight hundred one of the public health law, in which the person alleged to be incapacitated is a patient or resident.

S 81.07 NOTICE.

(a) Order to show cause. Upon the filing of the petition, the court shall:

1. set a date no more than twenty-eight days from the date of the filing of the petition on which the order to show cause is returnable. The court may for good cause shown set a date less than twenty-eight days from the date of the filing of the petition. The order to show cause shall fix the hearing date pursuant to section 81.11 of this article as the same date on which the order to show cause is returnable; the date of the hearing may be adjourned only for good cause shown;
2. include in the order to show cause the name, address, and telephone number of the person appointed as court evaluator in accordance with section 81.09 of this article; and
3. require the order to show cause to be served together with a copy of the petition and any supporting papers upon the persons identified in subdivision (d) of this section and in the form and manner prescribed herein.

(b) Form. The order to show cause shall be written in large type, in plain language, and in a language other than English if necessary to inform the person alleged to be incapacitated of his or her rights, and shall include the following information:

1. date, time, and place of the hearing of the petition;
2. a clear and easily readable statement of the rights of the person alleged to be incapacitated that are set forth in section 81.11 of this article;
3. the name, address, and telephone number of the person appointed as court evaluator pursuant to section 81.09 of this article;
4. the name, address, and telephone number of the attorney if one has been appointed for the person alleged to be incapacitated pursuant to section 81.10 of this article; and
5. a list of the powers which the guardian would have the authority to exercise on behalf of the person alleged to be incapacitated if the relief sought in the petition is granted.

(c) Legend. The order to show cause shall also include on its face the following legend in twelve point or larger bold face double spaced type:

IMPORTANT

An application has been filed in court by _____ who believes you may be unable to take care of your personal needs or financial affairs. _____ is asking that someone be appointed to make decisions for you. With this paper is a copy of the application to the court showing why _____ believes you may be unable to take care of your personal needs or financial affairs. Before the court makes the appointment of someone to make decisions for you the court holds a hearing at which you are entitled to be present and to tell the judge if you do not want anyone appointed. This paper tells you when the court hearing will take place. If you do not appear in court, your rights may be seriously affected.

You have the right to demand a trial by jury. You must tell the court if you wish to have a trial by jury. If you do not tell the court, the hearing will be conducted without a jury. The name and address, and telephone number of the clerk of the court are: _____.

The court has appointed a court evaluator to explain this proceeding to you and to investigate the claims made in the application. The court may give the court evaluator permission to inspect your medical, psychological, or psychiatric records. You have the right to tell the judge if you do not want the court evaluator to be given that permission. The court evaluator's name, address, and telephone number are: _____.

You are entitled to have a lawyer of your choice represent you. If you want the court to appoint a lawyer to help you and represent you, the court will appoint a lawyer for you. You will be required to pay that lawyer unless you do not have the money to do so.

(d) Service.

1. the persons entitled to service shall include:

(i) the person alleged to be incapacitated; and

(ii) the following persons, other than the petitioner, who are known to the petitioner or whose existence and address can be ascertained by the petitioner with reasonably diligent efforts: the spouse of the person alleged to be incapacitated, if any; the parents of the person alleged to be incapacitated, if living; the adult children of the person alleged to be incapacitated, if any; the adult siblings of the person alleged to be incapacitated, if any; the person or persons with whom person alleged to be incapacitated resides; and

(iii) in the event no person listed in subparagraph (ii) of this paragraph is given notice, then notice shall be given to at least one and not more than three of the living relatives of the person alleged to be incapacitated in the nearest degree of kinship who are known to the petitioner or whose existence and address can be ascertained by the petitioner with reasonably diligent efforts; and

(iv) any person or persons designated by the alleged incapacitated person with authority pursuant to sections 5-1501, 5-1601, and 5-1602 of the general obligations law, or sections two thousand nine hundred five and two thousand nine hundred eighty-one of the public health law, if known to the petitioner; and

(v) if known to the petitioner, any person, whether or not a relative of the person alleged to be incapacitated, or organization that has demonstrated a genuine interest in promoting the best interests of the person alleged to be incapacitated such as by having a personal relationship with the person, regularly visiting the person, or regularly communicating with the person; and

(vi) the attorney for the person alleged to be incapacitated, if known to the petitioner; and

(vii) the court evaluator; and

(viii) if it is known to the petitioner that the person alleged to be incapacitated receives public assistance or protective services under article nine-B of the social services law, the local department of social services; and

(ix) if the person alleged to be incapacitated resides in a facility, hospital, school, or an alcoholism facility in this state as those terms are defined in section 1.03 of this chapter, a substance abuse program as that term is defined in section 19.03 of this chapter, an adult care facility as that term is defined in section two of the social services law, a residential health care facility or a general hospital as those terms are defined in section two thousand eight hundred one of the public health law, the chief executive officer in charge of the facility, and the mental hygiene legal service of the judicial department in which the residence is located; and

(x) such other persons as the court may direct based on the recommendation of the court evaluator in accordance with subparagraph (xvii) of paragraph five of subdivision (c) of section 81.09 of this article.

2. manner of service.

(i) the order to show cause and a copy of the petition shall be personally delivered to the person alleged to be incapacitated not less than fourteen days prior to the return date of the order to show cause. However, the court may direct that the order to show cause and a copy of the petition be served on the person alleged to be incapacitated in a manner other than personal delivery when the petitioner demonstrates to the court's satisfaction that the person alleged to be incapacitated has refused to accept service. A copy of the order to show cause and the petition also shall be left with a person of suitable age and discretion at the residence of the person alleged to be incapacitated if he or she is not served there; and





(ii) the order to show cause and a copy of the petition shall be served by mail or by delivery to the office of the court evaluator and court appointed attorney, if there is one, within seven days following the appointment of the court evaluator and attorney; and

(iii) the order to show cause and a copy of the petition shall be personally served or served by mail upon the other persons identified in paragraph one of this subdivision not less than fourteen days prior to the return date of the order to show cause.

(e) Time period.

The court may direct that the order to show cause be served within a time period less than the period required in paragraph two of subdivision (d) of this section for good cause shown.

S 81.08 PETITION.

(a) The petition shall be verified under oath and shall include the following information:

1. the name, age, address, and telephone number of the person alleged to be incapacitated;
2. the name, address, and telephone number of the person or persons with whom the person alleged to be incapacitated resides, if any;
3. a description of the alleged incapacitated person's functional level including that person's ability to manage the activities of daily living, behavior, and understanding and appreciation of the nature and consequences of any inability to manage the activities of daily living;
4. if powers are sought with respect to the personal needs of the alleged incapacitated person, specific factual allegations as to the personal actions or other actual occurrences involving the person alleged to be incapacitated which are claimed to demonstrate that the person is likely to suffer harm because he or she cannot adequately understand and appreciate the nature and consequences of his or her inability to provide for personal needs;
5. if powers are sought with respect to property management for the alleged incapacitated person, specific factual allegations as to the financial transactions or other actual occurrences involving the person alleged to be incapacitated which are claimed to demonstrate that the person is likely to suffer harm because he or she cannot adequately understand and appreciate the nature and consequences of his or her inability to provide for property management;
6. the particular powers being sought and their relationship to the functional level and needs of the person alleged to be incapacitated;
7. the duration of the powers being sought;
8. the approximate value and description of the financial resources of the person alleged to be incapacitated and whether, to the best of the petitioner's knowledge, the person is a recipient of public assistance;
9. the nature and amount of any claim, debt, or obligations of the person alleged to be incapacitated, to the best of the petitioner's knowledge;
10. the names, addresses, and telephone numbers of presumptive distributees of the person alleged to be incapacitated as that term is defined in subdivision forty-two of section one hundred three of the surrogate's court procedure act unless they are unknown and cannot be reasonably ascertained;
11. the name, address, and telephone number of the petitioner;
12. the name, address, and telephone number of the person or persons, if any, proposed as guardian and standby guardian, the relationship of the proposed guardian or standby guardian to the person alleged to be incapacitated, and the reasons why the proposed guardian or standby guardian is suitable to exercise the powers necessary to assist the person alleged to be incapacitated;
13. any relief sought pursuant to section 81.23 of this article;
14. the available resources, if any, that have been considered by the petitioner and the petitioner's opinion as to their sufficiency and reliability;
15. any other information which in the petitioner's opinion will assist the court evaluator in completing the investigation and report in accordance with section 81.09 of this article.

S 81.09 APPOINTMENT OF COURT EVALUATOR.

(a) At the time of the issuance of the order to show cause, the court shall appoint a court evaluator.

(b) 1. the court may appoint as court evaluator any person drawn from a list maintained by the office of court administration with knowledge of property management, personal care skills, the problems associated with disabilities, and the private and public resources available for the type of limitations the person is alleged to have, including, but not limited to, an attorney-at-law, physician, psychologist, accountant, social worker, or nurse;

2. if the person alleged to be incapacitated resides in a facility, hospital, school, or an alcoholism facility as those terms are defined in section 1.03 of this chapter, or a substance abuse program as that term is defined in section 19.03 of this chapter, an adult care facility as that term is defined in section two of the social services law, a residential health care facility or a

general hospital as those terms are defined in section two thousand eight hundred one of the public health law, the mental hygiene legal service in the judicial department where the person resides may be appointed court evaluator;

3. if the court appoints the mental hygiene legal service as the evaluator and upon investigation in accordance with section 81.10 of this article it appears to the mental hygiene legal service that the mental hygiene legal service represents the person alleged to be incapacitated as counsel, or that counsel should otherwise be appointed in accordance with section 81.10 of this article for the person alleged to be incapacitated, the mental hygiene legal service shall so report to the court. The mental hygiene legal service shall be relieved of its appointment as court evaluator whenever the mental hygiene legal service represents as counsel, or is assigned to represent as counsel, the person alleged to be incapacitated.

(c) The duties of the court evaluator shall include the following:

1. meeting, interviewing, and consulting with the person alleged to be incapacitated regarding the proceeding.
2. explaining to the person alleged to be incapacitated, in a manner which the person can reasonably be expected to understand, the nature and possible consequences of the proceeding, the general powers and duties of a guardian, available resources, and the rights to which the person is entitled, including the right to counsel.
3. determining whether the person alleged to be incapacitated wishes legal counsel to be appointed and otherwise evaluating whether legal counsel should be appointed in accordance with section 81.10 of this article.
4. interviewing the petitioner, or, if the petitioner is a facility or government agency, a person within the facility or agency fully familiar with the person's condition, affairs and situation.
5. investigating and making a written report and recommendations to the court; the report and recommendations shall include the court evaluator's personal observations as to the person alleged to be incapacitated and his or her condition, affairs and situation, as well as information in response to the following questions:
 - (i) does the person alleged to be incapacitated agree to the appointment of the proposed guardian and to the powers proposed for the guardian;
 - (ii) does the person wish legal counsel to be appointed or is the appointment of counsel in accordance with section 81.10 of this article otherwise appropriate;
 - (iii) can the person alleged to be incapacitated come to the courthouse for the hearing;
 - (iv) if the person alleged to be incapacitated cannot come to the courthouse, is the person completely unable to participate in the hearing;
 - (v) if the person alleged to be incapacitated cannot come to the courthouse, would any meaningful participation result from the person's presence at the hearing;
 - (vi) are available resources sufficient and reliable to provide for personal needs or property management without the appointment of a guardian;
 - (vii) how is the person alleged to be incapacitated functioning with respect to the activities of daily living and what is the prognosis and reversibility of any physical and mental disabilities, alcoholism or substance dependence? The response to this question shall be based on the evaluator's own assessment of the person alleged to be incapacitated to the extent possible, and where necessary, on the examination of assessments by third parties, including records of medical, psychological and/or psychiatric examinations obtained pursuant to subdivision (d) of this section. As part of this review, the court evaluator shall consider the diagnostic and assessment procedures used to determine the prognosis and reversibility of any disability and the necessity, efficacy, and dose of each prescribed medication;
 - (viii) what is the person's understanding and appreciation of the nature and consequences of any inability to manage the activities of daily living;
 - (ix) what is the approximate value and nature of the financial resources of the person alleged to be incapacitated;
 - (x) what are the person's preferences, wishes, and values with regard to managing the activities of daily living;
 - (xi) has the person alleged to be incapacitated made any appointment or delegation pursuant to section 5-1501, 5-1601, or 5-1602 of the general obligations law, section two thousand nine hundred sixty-five or two thousand nine hundred eighty-one of the public health law, or a living will;
 - (xii) what would be the least restrictive form of intervention consistent with the person's functional level and the powers proposed for the guardian;
 - (xiii) what assistance is necessary for those who are financially dependent upon the person alleged to be incapacitated;
 - (xiv) is the choice of proposed guardian appropriate, including a guardian nominated by the allegedly incapacitated person pursuant to section 81.17 or subdivision (c) of section 81.19 of this article; and what steps has the proposed guardian taken or does the proposed guardian intend to take to identify and meet the current and emerging needs of the person alleged to be incapacitated unless that information has been provided to the court by the local department of social services when the proposed guardian is a community guardian program operating pursuant to the provisions of title three of article nine-B of the social services law;
 - (xv) what potential conflicts of interest, if any, exist between or among family members and/or other interested parties regarding the proposed guardian or the proposed relief;





(xvi) what potential conflicts of interest, if any, exist involving the person alleged to be incapacitated, the petitioner, and the proposed guardian; and

(xvii) are there any additional persons who should be given notice and an opportunity to be heard.

In addition, the report and recommendations shall include any information required under subdivision (e) of this section, and any additional information required by the court.

6. interviewing or consulting with professionals having specialized knowledge in the area of the person's alleged incapacity including but not limited to mental retardation, developmental disabilities, alcohol and substance abuse, and geriatrics.

7. retaining an independent medical expert where the court finds it is appropriate, the cost of which is to be charged to the estate of the allegedly incapacitated person unless the person is indigent.

8. conducting any other investigations or making recommendations with respect to other subjects as the court deems appropriate.

9. attending all court proceedings and conferences.

(d) The court evaluator may apply to the court for permission to inspect records of medical, psychological and/or psychiatric examinations of the person alleged to be incapacitated; except as otherwise provided by federal or state law, if the court determines that such records are likely to contain information which will assist the court evaluator in completing his or her report to the court, the court may order the disclosure of such records to the court evaluator, notwithstanding the physician/patient privilege as set forth in section four thousand five hundred four of the civil practice law and rules; if the court orders that such records be disclosed to the court evaluator, the court may, upon the court's own motion, at the request of the court evaluator, or upon the application of counsel for the person alleged to be incapacitated, or the petitioner, also direct such further disclosure of such records as the court deems proper.

(e) The court evaluator shall have the authority to take the steps necessary to preserve the property of the person alleged to be incapacitated pending the hearing in the event the property is in danger of waste, misappropriation, or loss; if the court evaluator exercises authority under this subdivision, the court evaluator shall include in his or her report to the court an explanation of the actions the court evaluator has taken and the reasons for such actions.

(f) When judgment grants a petition, the court may award a reasonable allowance to a court evaluator, including the mental hygiene legal service, payable by the estate of the allegedly incapacitated person. When a judgment denies or dismisses a petition, the court may award a reasonable allowance to a court evaluator, including the mental hygiene legal service, payable by the petitioner or by the person alleged to be incapacitated, or both in such proportions as the court may deem just. When the person alleged to be incapacitated dies before the determination is made in the proceeding, the court may award a reasonable allowance to a court evaluator, payable by the petitioner or by the estate of the decedent, or by both in such proportions as the court may deem just.

S 81.10 COUNSEL.

(a) Any person for whom relief under this article is sought shall have the right to be represented by legal counsel of the person's choice.

(b) If the person alleged to be incapacitated is not represented by counsel at the time of the issuance of the order to show cause, the court evaluator shall assist the court in accordance with subdivision (c) of section 81.09 of this article in determining whether counsel should be appointed.

(c) The court shall appoint counsel in any of the following circumstances:

1. the person alleged to be incapacitated requests counsel;

2. the person alleged to be incapacitated wishes to contest the petition;

3. the person alleged to be incapacitated does not consent to the authority requested in the petition to move the person alleged to be incapacitated from where that person presently resides to a nursing home or other residential facility as those terms are defined in section two thousand eight hundred one of the public health law, or other similar facility;

4. if the petition alleges that the person is in need of major medical or dental treatment and the person alleged to be incapacitated does not consent;

5. the petition requests temporary powers pursuant to section 81.23 of this article;

6. the court determines that a possible conflict may exist between the court evaluator's role and the advocacy needs of the person alleged to be incapacitated;

7. if at any time the court determines that appointment of counsel would be helpful to the resolution of the matter.

(d) If the person refuses the assistance of counsel, the court may, nevertheless, appoint counsel if the court is not satisfied that the person is capable of making an informed decision regarding the appointment of counsel.

(e) If the person alleged to be incapacitated resides in a facility, hospital, school, or an alcoholism facility as those terms are defined in section 1.03 of this chapter, a substance abuse program as that term is defined in section 19.03 of this chapter, an adult care facility as that term is defined in section two of the social services law, or a residential health care facility or a general hospital as those terms are defined in section two thousand eight hundred one of the public health law, the court may appoint as counsel the mental hygiene legal service in the judicial department where the residence is located.

(f) The court shall determine the reasonable compensation for the mental hygiene legal service or any attorney appointed pursuant to this section. The person alleged to be incapacitated shall be liable for such compensation unless the court is satisfied that the person is indigent. If the petition is dismissed, the court may in its discretion direct that petitioner pay such compensation for the person alleged to be incapacitated. When the person alleged to be incapacitated dies before the determination is made in the proceeding, the court may award reasonable compensation to the mental hygiene legal service or any attorney appointed pursuant to this section, payable by the petitioner or the estate of the decedent or by both in such proportions as the court may deem just.

(g) If the court appoints counsel under this section, the court may dispense with the appointment of a court evaluator or may vacate or suspend the appointment of a previously appointed court evaluator.

S 81.11 HEARING.

(a) A determination that the appointment of a guardian is necessary for a person alleged to be incapacitated shall be made only after a hearing.

(b) In a proceeding brought pursuant to this article any party to the proceeding shall have the right to:

1. present evidence;
2. call witnesses, including expert witnesses;
3. cross examine witnesses, including witnesses called by the court;
4. be represented by counsel of his or her choice.

(c) The hearing must be conducted in the presence of the person alleged to be incapacitated, either at the courthouse or where the person alleged to be incapacitated resides, so as to permit the court to obtain its own impression of the person's capacity. If the person alleged to be incapacitated physically cannot come or be brought to the courthouse, the hearing must be conducted where the person alleged to be incapacitated resides unless:

1. the person is not present in the state; or
2. all the information before the court clearly establishes that (i) the person alleged to be incapacitated is completely unable to participate in the hearing or (ii) no meaningful participation will result from the person's presence at the hearing.

(d) If the hearing is conducted without the presence of the person alleged to be incapacitated and the court appoints a guardian, the order of appointment shall set forth the factual basis for conducting the hearing without the presence of the person for whom the appointment is made.

(e) If the hearing is conducted in the presence of the person alleged to be incapacitated and the person is not represented by counsel, the court shall explain to that person, on the record, the purpose and possible consequences of the proceeding, the right to be represented by counsel and the fact that the court will appoint an attorney to represent the person alleged to be incapacitated if the person wishes to be represented by counsel, and shall inquire of the person whether he or she wishes to have an attorney appointed. If the person refuses the assistance of counsel, the court may nevertheless appoint counsel if the court is not satisfied that the person is capable of making an informed decision regarding the appointment of counsel.

(f) If any party to the proceeding on or before the return date designated in the order to show cause raises issues of fact regarding the need for an appointment under this article and demands a jury trial of such issues, the court shall order a trial by jury thereof. Failure to make such a demand shall be deemed a waiver of the right to trial by jury.

S 81.12 BURDEN AND QUANTUM OF PROOF.

(a) A determination that a person is incapacitated under the provisions of this article must be based on clear and convincing evidence. The burden of proof shall be on the petitioner.

(b) The court may, for good cause shown, waive the rules of evidence. The report of the court evaluator may be admitted in evidence if the court evaluator testifies and is subject to cross examination; provided, however, that if the court determines that information contained in the report is, in the particular circumstance of the case, not sufficiently reliable, the court shall require that the person who provided the information testify and be subject to cross examination.

S 81.13 TIMING OF HEARING.

Unless the court, for good cause shown, orders otherwise, a proceeding under this article is entitled to a preference over all other causes in the court. Unless the court, for good cause shown, orders otherwise, the hearing or trial shall be conducted within the time set forth in subdivision (a) of section 81.07 of this article. A decision shall be rendered within forty-five days of the date of the signing of the order to show cause, unless for good cause shown, the court extends the time period for rendering the decision. In the event the time period is extended, the court shall set forth the factual basis for the extension. The commission shall be issued to the guardian within fifteen days after the decision is rendered.

S 81.14 RECORD OF THE PROCEEDINGS.

(a) A record of the proceedings shall be made in all cases.





(b) The court shall not enter an order sealing the court records in a proceeding under this article, either in whole or in part, except upon a written finding of good cause, which shall specify the grounds thereof. In determining whether good cause has been shown, the court shall consider the interest of the public, the orderly and sound administration of justice, the nature of the proceedings, and the privacy of the person alleged to be incapacitated. Where it appears necessary or desirable, the court may prescribe appropriate notice and opportunity to be heard. Court records shall include all documents and records of any nature filed with the clerk in connection with the proceeding. Documents obtained through disclosure and not filed with the clerk shall remain subject to protective orders under the civil practice law and rules.

(c) The court shall not exclude a person or persons or the general public from a proceeding under this article except upon written findings of good cause shown. In determining whether good cause has been shown, the court shall consider the interest of the public, the orderly and sound administration of justice, the nature of the proceedings, and the privacy of the person alleged to be incapacitated.

(d) At the time of the commencement of the hearing, the court shall inform the allegedly incapacitated person of his or her right to request for good cause that the court records be sealed and that a person, persons, or the general public be excluded from the hearing.

S 81.15 FINDINGS.

(a) Where the court determines that the person agrees to the appointment and that the appointment is necessary, the court shall make the following findings on the record:

1. the person's agreement to the appointment;
2. the person's functional limitations which impair the person's ability to provide for personal needs or property management;
3. the necessity of the appointment of a guardian as a means of providing for personal needs and/or property management for the person;
4. the specific powers of the guardian which constitute the least restrictive form of intervention consistent with the person's functional limitations; and
5. the duration of the appointment.

(b) Where the petition requests the appointment of a guardian to provide for the personal needs for a person alleged to be incapacitated and the court determines that such person is incapacitated and that the appointment is necessary, the court shall make the following findings on the record:

1. the person's functional limitations which impair the person's ability to provide for personal needs;
2. the person's lack of understanding and appreciation of the nature and consequences of his or her functional limitations;
3. the likelihood that the person will suffer harm because of the person's functional limitations and inability to adequately understand and appreciate the nature and consequences of such functional limitations;
4. the necessity of the appointment of a guardian to prevent such harm;
5. the specific powers of the guardian which constitute the least restrictive form of intervention consistent with the findings of this subdivision; and
6. the duration of the appointment.

(c) Where the petition requests the appointment of a guardian for property management for the person alleged to be incapacitated, and the court determines that the person is incapacitated and that the appointment of a guardian is necessary, the court shall make the following findings on the record:

1. the type and amount of the property and financial resources of the person alleged to be incapacitated;
2. the person's functional limitations which impair the person's ability with respect to property management;
3. the person's lack of understanding and appreciation of the nature and consequences of his or her functional limitations;
4. the likelihood that the person will suffer harm because of the person's functional limitations and inability to adequately understand and appreciate the nature and consequences of such functional limitations;
5. any additional findings that are required under section 81.21 of this article;
6. the necessity of the appointment of a guardian to prevent such harm;
7. if so, the specific powers of the guardian which constitute the least restrictive form of intervention consistent with the person's functional limitations and the likelihood of harm because of the person's inability to adequately understand and appreciate the nature and consequences of such functional limitations; and
8. the duration of the appointment.

S 81.16 DISPOSITIONAL ALTERNATIVES.

(a) Dismissal of the petition.

If the person alleged to be incapacitated under this article is found not to be incapacitated, the court shall dismiss the petition.

(b) Protective arrangements and single transactions. If the person alleged to be incapacitated is found to be incapacitated, the court without appointing a guardian, may authorize, direct, or ratify any transaction or series of transactions necessary to achieve any security, service, or care arrangement meeting the foreseeable needs of the incapacitated person, or may authorize, direct, or ratify any contract, trust, or other transaction relating to the incapacitated person's property and financial affairs if the court determines that the transaction is necessary as a means of providing for personal needs and/or property management for the alleged incapacitated person. Before approving a protective arrangement or other transaction under this subdivision, the court shall consider the interests of dependents and creditors of the incapacitated person, and in view of the person's functional level, whether the person needs the continuing protection of a guardian. The court may appoint a special guardian to assist in the accomplishment of any protective arrangement or other transaction authorized under this subdivision. The special guardian shall have the authority conferred by the order of appointment, shall report to the court on all matters done pursuant to the order of appointment and shall serve until discharged by order of the court. The court may approve a reasonable compensation for the special guardian; however, if the court finds that the special guardian has failed to discharge his or her duties satisfactorily in any respect, the court may deny or reduce the amount of compensation or remove the special guardian.

(c) Appointing a guardian.

1. If the person alleged to be incapacitated is found to have agreed to the appointment of a guardian and the court determines that the appointment of a guardian is necessary, the order of the court shall be designed to accomplish the least restrictive form of intervention by appointing a guardian with powers limited to those which the court has found necessary to assist the person in providing for personal needs and/or property management.

2. If the person alleged to be incapacitated is found to be incapacitated and the court determines that the appointment of a guardian is necessary, the order of the court shall be designed to accomplish the least restrictive form of intervention by appointing a guardian with powers limited to those which the court has found necessary to assist the incapacitated person in providing for personal needs and/or property management.

3. The order of appointment shall identify all persons entitled to notice of all further proceedings.

(d) The court shall direct that a judgment be entered determining the rights of the parties.

(e) A copy of the order and judgment shall be personally served upon and read to the person who is the subject of the proceedings by the court evaluator or by counsel for the person.

(f) When a petition is granted, or where the court otherwise deems it appropriate, the court may award reasonable compensation for the attorney for the petitioner, including the attorney general and the attorney for a local department of social services.

S 81.17 NOMINATION OF GUARDIAN.

In the petition, or in a written instrument duly executed, acknowledged, and filed in the proceeding before the appointment of a guardian, the person alleged to be incapacitated may nominate a guardian.

S 81.18 FOREIGN GUARDIAN FOR A PERSON NOT PRESENT IN THE STATE.

Where the person alleged to be incapacitated is not present the state and a guardian, by whatever name designated, has been duly appointed pursuant to the laws of any other state, territory, or country where the person alleged to be incapacitated resides to assist such person in property management, the court in its discretion, may make an order appointing the foreign guardian as a guardian under this article with powers with respect to property management within this state on the foreign guardian's giving such security as the court deems proper.

S 81.19 ELIGIBILITY AS GUARDIAN.

(a) 1. Any individual over eighteen years of age, or any parent under eighteen years of age, who is found by the court to be suitable to exercise the powers necessary to assist the incapacitated person may be appointed as guardian, including but not limited to a spouse, adult child, parent, or sibling.

2. A not-for-profit corporation organized to act in such capacity, a social services official, or public agency authorized to act in such capacity which has a concern for the incapacitated person, and any community guardian program operating pursuant to the provisions of title three of article nine-B of the social services law which is found by the court to be suitable to perform the duties necessary to assist the incapacitated person may be appointed as guardian, provided that a community guardian program shall be appointed as guardian only where a special proceeding for the appointment of a guardian under this article has been commenced by a social services official with whom such program was contracted.





3. A corporation, except that no corporation (other than as provided in paragraph two of this subdivision) may be authorized to exercise the powers necessary to assist the incapacitated person with personal needs.

(b) The court shall appoint a person nominated as the guardian in accordance with the provisions of section 81.17 of this article unless the court determines the nominee is unfit or the alleged incapacitated person indicates that he or she no longer wishes the nominee to be appointed.

(c) In the absence of a nomination in accordance with section 81.17 of this article, the court shall appoint a person nominated by the person alleged to be incapacitated orally or by conduct during the hearing or trial unless the court determines for good cause that such appointment is not appropriate.

(d) In making any appointment under this article the court shall consider:

1. any appointment or delegation made by the person alleged to be incapacitated in accordance with the provisions of section 5-1501, 5-1601 or 5-1602 of the general obligations law and sections two thousand nine hundred sixty-five and two thousand nine hundred eighty-one of the public health law;

2. the social relationship between the incapacitated person and the person, if any, proposed as guardian, and the social relationship between the incapacitated person and other persons concerned with the welfare of the incapacitated person;

3. the care and services being provided to the incapacitated person at the time of the proceeding;

4. the powers which the guardian will exercise;

5. the educational, professional and business experience relevant to the nature of the services sought to be provided;

6. the nature of the financial resources involved;

7. the unique requirements of the incapacitated person; and

8. any conflicts of interest between the person proposed as guardian and the incapacitated person.

(e) Unless the court finds that no other person or corporation is available or willing to act as guardian, or to provide needed services for the incapacitated person, the following persons or corporations may not serve as guardian:

1. one whose only interest in the person alleged to be incapacitated is that of a creditor;

2. one, other than a relative, who is a provider, or the employee of a provider, of health care, day care, educational, or residential services to the incapacitated person, whether direct or indirect.

(f) Mental hygiene legal service may not serve as a guardian.

S 81.20 DUTIES OF GUARDIAN.

(a) Duties of guardian generally.

1. a guardian shall exercise only those powers that the guardian is authorized to exercise by court order;

2. a guardian shall exercise the utmost care and diligence when acting on behalf of the incapacitated person;

3. a guardian shall exhibit the utmost degree of trust, loyalty and fidelity in relation to the incapacitated person;

4. a guardian shall file an initial and annual reports in accordance with sections 81.30 and 81.31 of this article;

5. a guardian shall visit the incapacitated person not less than four times a year or more frequently as specified in the court order;

6. a guardian who is given authority with respect to property management for the incapacitated person shall:

(i) afford the incapacitated person the greatest amount of independence and self-determination with respect to property management in light of that person's functional level, understanding and appreciation of his or her functional limitations, and personal wishes, preferences and desires with regard to managing the activities of daily living;

(ii) preserve, protect, and account for such property and financial resources faithfully;

(iii) determine whether the incapacitated person has executed a will, determine the location of any will, and the appropriate persons to be notified in the event of the death of the incapacitated person and, in the event of the death of the incapacitated person, notify those persons;

(iv) use the property and financial resources and income available therefrom to maintain and support the incapacitated person, and to maintain and support those persons dependent upon the incapacitated person;

(v) at the termination of the appointment, deliver such property to the person legally entitled to it;

(vi) file with the recording officer of the county wherein the incapacitated person is possessed of real property, an acknowledged statement to be recorded and indexed under the name of the incapacitated person identifying the real property possessed by the incapacitated person, and the tax map numbers of the property, and stating the date of adjudication of incapacity of the person regarding property management, and the name, address, and telephone number of the guardian and the guardian's surety; and

(vii) perform all other duties required by law.

7. a guardian who is given authority relating to the personal needs of the incapacitated person shall afford the incapacitated person the greatest amount of independence and self-determination with respect to personal needs in light of that person's

functional level, understanding and appreciation of that person's functional limitations, and personal wishes, preferences and desires with regard to managing the activities of daily living.

§ 81.21 POWERS OF GUARDIAN; PROPERTY MANAGEMENT.

(a) Consistent with the functional limitations of the incapacitated person, that person's understanding and appreciation of the harm that he or she is likely to suffer as the result of the inability to manage property and financial affairs, and that person's personal wishes, preferences, and desires with regard to managing the activities of daily living, and the least restrictive form of intervention, the court may authorize the guardian to exercise those powers necessary and sufficient to manage the property and financial affairs of the incapacitated person; to provide for the maintenance and support of the incapacitated person, and those persons depending upon the incapacitated person; to transfer a part of the incapacitated person's assets to or for the benefit of another person on the ground that the incapacitated person would have made the transfer if he or she had the capacity to act. Transfers made pursuant to this article may be in any form that the incapacitated person could have employed if he or she had the requisite capacity, except in the form of a will or codicil.

Those powers which may be granted include, but are not limited to, the power to:

1. make gifts;
2. provide support for persons dependent upon the incapacitated person for support, whether or not the incapacitated person is legally obligated to provide that support;
3. convey or release contingent and expectant interests in property, including marital property rights and any right of survivorship incidental to joint tenancy or tenancy by the entirety;
4. exercise or release powers held by the incapacitated person as trustee, personal representative, guardian for minor, guardian, or donee of a power of appointment;
5. enter into contracts;
6. create revocable or irrevocable trusts of property of the estate which may extend beyond the incapacity or life of the incapacitated person;
7. exercise options of the incapacitated person to purchase securities or other property;
8. exercise rights to elect options and change beneficiaries under insurance and annuity policies and to surrender the policies for their cash value;
9. exercise any right to an elective share in the estate of the incapacitated person's deceased spouse;
10. renounce or disclaim any interest by testate or intestate succession or by inter vivos transfer consistent with paragraph (c) of section 2-1.11 of the estates, powers and trusts law;
11. authorize access to or release of confidential records; and
12. apply for government and private benefits.

(b) If the petitioner or the guardian seeks the authority to exercise a power which involves the transfer of a part of the incapacitated person's assets to or for the benefit of another person, including the petitioner or guardian, the petition shall include the following information:

1. whether any prior proceeding has at any time been commenced by any person seeking such power with respect to the property of the incapacitated person and, if so, a description of the nature of such application and the disposition made of such application;
2. the amount and nature of the financial obligations of the incapacitated person including funds presently and prospectively required to provide for the incapacitated person's own maintenance, support, and well-being and to provide for other persons dependent upon the incapacitated person for support, whether or not the incapacitated person is legally obligated to provide that support; a copy of any court order or written agreement setting forth support obligations of the incapacitated person shall be attached to the petition if available to the petitioner or guardian;
3. the property of the incapacitated person that is the subject of the present application;
4. the proposed disposition of such property and the reasons why such disposition should be made;
5. whether the incapacitated person has sufficient capacity to make the proposed disposition; if the incapacitated person has such capacity, his or her written consent shall be attached to the petition;
6. whether the incapacitated person has previously executed a will or similar instrument and if so, the terms of the most recently executed will together with a statement as to how the terms of the will became known to the petitioner or guardian; for purposes of this article, the term "will" shall have the meaning specified in section 1-2.19 of the estates, powers and trusts law and "similar instrument" shall include a revocable or irrevocable trust:

(i) if the petitioner or guardian can, with reasonable diligence, obtain a copy, a copy of the most recently executed will or similar instrument shall be attached to the petition; in such case, the petition shall contain a statement as to how the copy was secured and the basis for the petitioner or guardian's belief that such copy is a copy of the incapacitated person's most recently executed will or similar instrument.





(ii) if the petitioner or guardian is unable to obtain a copy of the most recently executed will or similar instrument, or if the petitioner or guardian is unable to determine whether the incapacitated person has previously executed a will or similar instrument, what efforts were made by the petitioner or guardian to ascertain such information.

(iii) if a copy of the most recently executed will or similar instrument is not otherwise available, the court may direct an attorney or other person who has the original will or similar instrument in his or her possession to turn a photocopy over to the court for its examination, in camera. A photocopy of the will or similar instrument shall then be turned over by the court to the parties in such proceeding unless the court finds that to do so would be contrary to the best interests of the incapacitated person;

7. a description of any significant gifts or patterns of gifts made by the incapacitated person;

8. the names, post-office addresses and relationships of the presumptive distributees of the incapacitated person as that term is defined in subdivision forty-two of section one hundred three of the surrogate's court procedure act and of the beneficiaries under the most recent will or similar instrument executed by the incapacitated person.

(c) Notice of a petition seeking relief under this section shall be served upon: (i) the persons entitled to notice in accordance with paragraph one of subdivision (d) of section 81.07 of this article;

(ii) if known to the petitioner or guardian, the presumptive distributees of the incapacitated person as that term is defined in subdivision forty-two of section one hundred three of the surrogate's court procedure act unless the court dispenses with such notice; and

(iii) if known to the petitioner or guardian, any person designated in the most recent will or similar instrument of the incapacitated person as beneficiary whose rights or interests would be adversely affected by the relief requested in the petition unless the court dispenses with such notice.

(d) In determining whether to approve the application, the court shall consider:

1. whether the incapacitated person has sufficient capacity to make the proposed disposition himself or herself, and, if so, whether he or she has consented to the proposed disposition;

2. whether the disability of the incapacitated person is likely to be of sufficiently short duration such that he or she should make the determination with respect to the proposed disposition when no longer disabled;

3. whether the needs of the incapacitated person and his or her dependents or other persons depending upon the incapacitated person for support can be met from the remainder of the assets of the incapacitated person after the transfer is made;

4. whether the donees or beneficiaries of the proposed disposition are the natural objects of the bounty of the incapacitated person and whether the proposed disposition is consistent with any known testamentary plan or pattern of gifts he or she has made;

5. whether the proposed disposition will produce estate, gift, income or other tax savings which will significantly benefit the incapacitated person or his or her dependents or other persons for whom the incapacitated person would be concerned; and

6. such other factors as the court deems relevant.

(e) The court may grant the application if satisfied by clear and convincing evidence of the following and shall make a record of these findings:

1. the incapacitated person lacks the requisite mental capacity to perform the act or acts for which approval has been sought and is not likely to regain such capacity within a reasonable period of time or, if the incapacitated person has the requisite capacity, that he or she consents to the proposed disposition;

2. a competent, reasonable individual in the position of the incapacitated person would be likely to perform the act or acts under the same circumstances; and

3. the incapacitated person has not manifested an intention inconsistent with the performance of the act or acts for which approval has been sought at some earlier time when he or she had the requisite capacity or, if such intention was manifested, the particular person would be likely to have changed such intention under the circumstances existing at the time of the filing of the petition.

(f) Nothing in this article imposes any duty on the guardian to commence a special proceeding pursuant to this article seeking to transfer a part of the assets of the incapacitated person to or for the benefit of another person and the guardian shall not be liable or accountable to any person for having failed to commence a special proceeding pursuant to this article seeking to transfer a part of the assets of the incapacitated person to or for the benefit of another person.

S 81.22 POWERS OF GUARDIAN; PERSONAL NEEDS.

(a) Consistent with the functional limitations of the incapacitated person, that person's understanding and appreciation of the harm that he or she is likely to suffer as the result of the inability to provide for personal needs, and that person's personal wishes, preferences, and desires with regard to managing the activities of daily living, and the least restrictive form of intervention, the court may grant to the guardian powers necessary and sufficient to provide for the personal needs of the incapacitated person. Those powers which may be granted include, but are not limited to, the power to:

1. determine who shall provide personal care or assistance;



2. make decisions regarding social environment and other social aspects of the life of the incapacitated person;
3. determine whether the incapacitated person should travel;
4. determine whether the incapacitated person should possess a license to drive;
5. authorize access to or release of confidential records;
6. make decisions regarding education;
7. apply for government and private benefits;
8. consent to or refuse generally accepted routine or major medical or dental treatment; the guardian shall make treatment decisions consistent with the findings under section 81.15 of this article and in accordance with the patient's wishes, including the patient's religious and moral beliefs, or if the patient's wishes are not known and cannot be ascertained with reasonable diligence, in accordance with the person's best interests, including a consideration of the dignity and uniqueness of every person, the possibility and extent of preserving the person's life, the preservation, improvement or restoration of the person's health or functioning, the relief of the person's suffering, the adverse side effects associated with the treatment, any less intrusive alternative treatments, and such other concerns and values as a reasonable person in the incapacitated person's circumstances would wish to consider;
9. choose the place of abode; the choice of abode must be consistent with the findings under section 81.15 of this article, the existence of and availability of family, friends and social services in the community, the care, comfort and maintenance, and where appropriate, rehabilitation of the incapacitated person, the needs of those with whom the incapacitated person resides; placement of the incapacitated person in a nursing home or residential care facility as those terms are defined in section two thousand eight hundred one of the public health law, or other similar facility shall not be authorized without the consent of the incapacitated person so long as it is reasonable under the circumstances to maintain the incapacitated person in the community, preferably in the home of the incapacitated person.

(b) No guardian may:

1. consent to the voluntary formal or informal admission of the incapacitated person to a mental hygiene facility under article nine or fifteen of this chapter or to a chemical dependence facility under article twenty-two of this chapter;
2. revoke any appointment or delegation made by the incapacitated person pursuant to sections 5-1501, 5-1601 and 5-1602 of the general obligations law, sections two thousand nine hundred sixty-five and two thousand nine hundred eighty-one of the public health law, or any living will.

§ 81.23 PROVISIONAL REMEDIES.

(a) Temporary guardian.

1. At the commencement of the proceeding or at any subsequent stage of the proceeding prior to the appointment of a guardian, the court may, upon showing of danger in the reasonably foreseeable future to the health and well being of the alleged incapacitated person, or danger of waste, misappropriation, or loss of the property of the alleged incapacitated person, appoint a temporary guardian for a period not to extend beyond the date of the issuance of the commission to a guardian appointed pursuant to this article. The powers and duties of the temporary guardian shall be specifically enumerated in the order of appointment and are limited in the same manner as are the powers of a guardian appointed pursuant to this article. Prior to the expiration of the term of appointment, the temporary guardian shall report to the court all actions taken pursuant to the order appointment. The court may approve a reasonable compensation for the temporary guardian; however, if the court finds that the temporary guardian has failed to discharge his or her duties satisfactorily in any respect, the court may deny or reduce the amount of compensation or remove the temporary guardian.
2. Notice of the appointment of the temporary guardian shall be given to the person alleged to be incapacitated and to any person having custody or control over the person or property of the person alleged to be incapacitated in such manner as the court may prescribe.
3. The authority and responsibility of a temporary guardian begins upon the issuance of the commission of temporary guardianship.
4. The court may require the temporary guardian to file a bond in accordance with section 81.25 of this article.

(b) Injunction and temporary restraining order.

1. The court may, with or without security, enjoin any person, other than the incapacitated person or the person alleged to be incapacitated from selling, assigning, or from disposing of property or confessing judgment which may become a lien on property or receiving or arranging for another person to receive property from the incapacitated person or the person alleged to be incapacitated or doing or suffering to be done any act or omission endangering the welfare of the incapacitated person or the person alleged to be incapacitated when an application under this article seeks such an injunction and it satisfactorily appears from the application, affidavits, and other proofs that a person has done, has suffered to be done or omitted to do, or threatens to do or is about to do an act that endangers the welfare of the incapacitated person or the person alleged to be incapacitated or has acquired or is about to acquire any property from the incapacitated person or person alleged to be incapacitated during the time of that person's incapacity or alleged incapacity without adequate consideration. Such order shall be made upon an order to show cause or upon the initiative of the court and may, upon the application for the appointment



of a guardian, in the discretion of the court, be continued for ten days after the appointment of an adult guardian. Notice of any injunction shall be given to any person enjoined, to the incapacitated person or the person alleged to be incapacitated, and to any person having custody or control over the person or property of the incapacitated person or the person alleged to be incapacitated in such manner as the court may prescribe.

2. A temporary restraining order may be granted with or without security when an application seeks an injunction under paragraph one of this subdivision and where the court is satisfied that in the absence of such restraining order, the property of the incapacitated person or person alleged to be incapacitated would be dissipated to that person's detriment or that the welfare of the incapacitated person or the person alleged to be incapacitated would be endangered. Notice of the temporary restraining order shall be given to any person restrained, to the incapacitated person or the person alleged to be incapacitated, and to any person having custody or control over the person or property of the incapacitated person or person alleged to be incapacitated in such manner as the court may prescribe. Such temporary restraining order shall neither be vacated nor modified except upon notice to the petitioner and to each person required to receive notice of the petition pursuant to paragraph one of subdivision (d) of section 81.07 of this article.

3. When the court is satisfied that the interest of the incapacitated person or person alleged to be incapacitated would be appropriately served, the court may provide in a temporary restraining order that such temporary restraining order shall have the effect of:

- (i) a restraining notice when served in a manner and upon such persons as the court in its discretion shall deem appropriate;
- (ii) conferring information subpoena power upon the attorney for the petitioner when the court in its discretion shall deem appropriate.

4. Where such a temporary restraining order provides for a restraining notice a person having custody or control over the person or property of the incapacitated person or the person alleged to be incapacitated is forbidden to make or suffer any sale, assignment, transfer or interference with any property of the incapacitated person or the person alleged to be incapacitated except pursuant to the order of the court.

5. Where such a temporary restraining order provides the petitioner's attorney with information subpoena power, service of a copy of the order together with an information subpoena shall require any person so subpoenaed to provide petitioner's attorney with any information concerning the financial affairs of the incapacitated person or the person alleged to be incapacitated.

§ 81.24 NOTICE OF PENDENCY.

The petitioner shall, prior to judgment, file a notice of pendency if real property or any interest therein is or may be affected by the proceeding.

§ 81.25 FILING OF BOND BY GUARDIAN.

(a) Before the guardian, or special guardian appointed under this article, enters upon the execution of the guardian's duties, the court may require or dispense with the filing of a bond.

(b) The court may require or dispense with the filing of a bond by the temporary guardian. If the temporary guardian is required to file a bond, such bond must be filed within ten days after the issuance of the temporary guardian's commission.

(c) Notwithstanding any other provision of this section, any community guardian program operating pursuant to the provisions of title three of article nine-B of the social services law, appointed as guardian pursuant to subdivision (a) of section 81.19 of this article, may file with the clerk of the court before the thirty-first day of January of each year, a consolidated undertaking up to the amount of one million five hundred thousand dollars, in lieu of filing individual undertakings for each incapacitated person for whom it serves as guardian, as required by subdivision (a) of this section. To the extent of the aggregate value of such consolidated undertaking, the community guardian program will certify to the clerk of the court faithful discharge of the trust imposed upon it, obey all directions of the court in regard to the trust, and make and render a true account of all properties received by it and the application thereof and of its acts in the administration of its trust whenever so required to do by the court. At such time as the aggregate amount of the individual bonds, fixed by the court pursuant to subdivision (a) of this section for persons for whom the community guardian program is appointed guardian, shall exceed the consolidated bond filed by such program, the program shall before entering upon the execution of its duties, file with the clerk of the court individual undertakings, in the amounts fixed by the court, that it will faithfully discharge the trust imposed upon it.

(d) If the court requires the filing of a bond, the guardian or special or temporary guardian appointed under this article shall file with the clerk of the court by which such guardian was appointed a bond that he or she will faithfully discharge the powers granted by the court to the guardian, obey all directions of the court in regard to the powers, and make and render a true account of all properties received by him or her and the application thereof and a true report of his or her acts in the administration of his or her powers, whenever so required to do by the court. The amount of the bond shall be fixed by the court. If the guardian receives after-acquired property not covered by the bond, such guardian shall immediately have such acquisition approved by the court and file a further bond.

S 81.26 DESIGNATION OF CLERK TO RECEIVE PROCESS.

No commission shall issue nor shall any order which in itself constitutes a commission become effective until an instrument executed and acknowledged by the guardian has been filed with the clerk of the court designating the clerk and the clerk's successor in office as a person on whom service of any process may be made in like manner and with like effect as if it were served personally upon the guardian whenever the guardian cannot, with due diligence, be served within the state.

S 81.27 COMMISSION TO GUARDIAN.

Within five days after the guardian has filed a designation under section 81.26 of this article, and has filed a bond in accordance with the provisions of section 81.25 of this article unless the court has waived the filing of the bond or unless the guardian's appointment is pursuant to section 81.23 of this article, the clerk of the court shall issue a commission which shall state:

1. the title of the proceeding and the name, address, and telephone number of the incapacitated person; and
2. the name, address, and telephone number of the guardian and the specific powers of such guardian; and
3. the date when the appointment of the guardian was ordered by the court; and
4. the date on which the appointment terminates if one has been ordered by the court.

S 81.28 COMPENSATION OF GUARDIAN.

(a) The court shall establish, and may from time to time modify, a plan for the reasonable compensation of the guardian. The plan for compensation of the guardian may be similar to the compensation of a trustee pursuant to section two thousand three hundred nine of the surrogate's court procedure act; however, the plan must take into account the specific authority of the guardian to provide for the personal needs and/or property management for the incapacitated person.

(b) If the court finds that the guardian has failed to discharge his or her duties satisfactorily in any respect, the court may deny or reduce the compensation which would otherwise be allowed.

S 81.29 EFFECT OF THE APPOINTMENT ON THE INCAPACITATED PERSON.

(a) An incapacitated person for whom a guardian has been appointed retains all powers and rights except those powers and rights which the guardian is granted.

(b) Subject to subdivision (a) of this section, the appointment of a guardian shall not be conclusive evidence that the person lacks capacity for any other purpose, including the capacity to dispose of property by will.

(c) The title to all property of the incapacitated person shall be in such person and not in the guardian. The property shall be subject to the possession of the guardian and to the control of the court for the purposes of administration, sale or other disposition only to the extent directed by the court order appointing the guardian.

(d) If the court determines that the person is incapacitated and appoints a guardian, the court may modify, amend, or revoke any previously executed appointment, power, or delegation under section 5-1501, 5-1601, or 5-1602 of the general obligations law or section two thousand nine hundred sixty-five of the public health law, or section two thousand nine hundred eighty-one of the public health law notwithstanding section two thousand nine hundred ninety-two of the public health law, or any contract, conveyance, or disposition during lifetime or to take effect upon death, made by the incapacitated person prior to the appointment of the guardian if the court finds that the previously executed appointment, power, delegation, contract, conveyance, or disposition during lifetime or to take effect upon death, was made while the person was incapacitated.

(e) Nothing in this article shall be construed either to prohibit a court from granting, or to authorize a court to grant, to any person the power to give consent for the withholding or withdrawal of life sustaining treatment, including artificial nutrition and hydration. When used in this article, life sustaining treatment means medical treatment which is sustaining life functions and without which, according to reasonable medical judgment, that patient will die within a relatively short time period.

S 81.30 INITIAL REPORT.

(a) No later than ninety days after the issuance of the commission to the guardian, the guardian shall file with the court a report in a form prescribed by the court stating what steps the guardian has taken to fulfill his or her responsibilities. Proof of completion of the guardian education requirements under section 81.39 of this article must be filed with the initial report.

(b) To the extent that the guardian has been granted powers with respect to property management, the initial report shall contain a verified and complete inventory of the property and financial resources over which the guardian has control, the location of any will executed by the incapacitated person, the guardian's plan, consistent with the court's order of appointment, for the management of such property and financial resources, and any need for any change in the powers authorized by the court.

(c) To the extent that the guardian has been granted powers regarding personal needs, the initial report shall contain a report of the guardian's personal visits with the incapacitated person, and the steps the guardian has taken, consistent with the court's order, to provide for the personal needs of that person, the guardian's plan, consistent with the court's order of





appointment, for providing for the personal needs of the incapacitated person, a copy of any directives in accordance with sections two thousand nine hundred sixty-five and two thousand nine hundred eighty-one of the public health law, any living will, and any other advance directive, and any necessary change in the powers authorized by the court. The plan for providing for the personal needs of the incapacitated person shall include the following information:

1. the medical, dental, mental health, or related services that are to be provided for the welfare of the incapacitated person;
2. the social and personal services that are to be provided for the welfare of the incapacitated person;
3. any physical, dental, and mental health examinations necessary to determine the medical, dental, and mental health treatment needs; and
4. the application of health and accident insurance and any other private or government benefits to which the incapacitated person may be entitled to meet any part of the costs of medical, dental, mental health, or related services provided to the incapacitated person.

(d) If the initial report sets forth any reasons for a change in the powers authorized by the court, the guardian shall make an application within ten days of the filing of the report on notice to the persons entitled to such notice in accordance with paragraph one of subdivision

(d) of section 81.07 of this article for such relief. If the initial report sets forth any reasons for a change in the powers authorized by the court and the guardian fails to act under this subdivision, any person entitled to commence a proceeding under this article may petition the court for a change in such powers on notice to the guardian and the persons entitled to such notice in accordance with paragraph one of subdivision (d) of section 81.07 of this article for such relief.

§ 81.31 ANNUAL REPORT.

(a) Filing of annual report. Every guardian shall file a report annually in the month of May, or at any other time upon motion or order of the court.

(b) The report shall be in a form prescribed by the court and shall include the following information:

1. the present address and telephone number of the guardian.
2. the present address, and telephone number of the incapacitated person; if the place of residence of the incapacitated person is not his or her personal home, the name, address, and telephone number of the facility or place at which the person resides and the name of the chief executive officer of the facility or person otherwise responsible for the person's care.
3. any major changes in the physical or mental condition of the incapacitated person and any substantial change in medication.
4. the date that the incapacitated person was last examined or otherwise seen by a physician and the purpose of that visit.
5. a statement by a physician, psychologist, nurse clinician, or social worker, or other person that has evaluated or examined the incapacitated person within the three months prior to the filing of the report regarding an evaluation of the incapacitated person's condition and the current functional level of the incapacitated person.
6. to the extent the guardian is charged with providing for the personal needs of the incapacitated person:
 - (i) a statement of whether the current residential setting is best suited to the current needs of the incapacitated person;
 - (ii) a resume of any professional medical treatment given to the ward in the preceding year;
 - (iii) the plan for medical, dental, and mental health treatment, and related services in the coming year;
 - (iv) information concerning the social condition of the incapacitated person, including: the social and personal services currently utilized by the incapacitated person; the social skills of the incapacitated person; and the social needs of the incapacitated person.
7. to the extent the guardian is charged with property management, information required by the provisions of the surrogate's court procedure act prescribing the form of papers to be filed upon the annual accounting of a general guardian of an infant's property.
8. where the guardian has used or employed the services of the incapacitated person or where moneys have been earned by or received on behalf of such incapacitated person an accounting of any moneys earned or derived from such services.
9. a resume of any other activities performed by the guardian on behalf of the incapacitated person.
10. facts indicating the need to terminate the appointment of the guardian, or for any alteration in the powers of the guardian and what specific authority is requested or what specific authority of the guardian will be affected.
11. any other information which the guardian may be required to file by the order of appointment.

(c) The guardian shall send a copy of the annual report to the incapacitated person by mail and shall file a copy of the annual report as provided herein. If the incapacitated person resides in a facility, hospital, school, or an alcoholism facility in this state as those terms are defined in section 1.03 of this chapter, a substance abuse program as that term is defined in section 19.03 of this chapter, an adult care facility as that term is defined in section two of the social services law, a residential health care facility or a general hospital as those terms are defined in section two thousand eight hundred one of the public health

law, the guardian shall send a duplicate of such report to the chief executive officer of that facility and the mental hygiene legal service of the judicial department in which the residence is located.

(d) The report shall be filed in the office of the clerk of the county in which the incapacitated person last resided before the appointment of the guardian if he or she was at such time a resident of the city of New York. If the incapacitated person was not then a resident of the city of New York, it shall be filed in the office of the clerk of the court which appointed the guardian.

(e) If the annual report sets forth any reasons for a change in the powers authorized by the court, the guardian shall make an application within ten days of the filing of the report on notice to the persons entitled to such notice in accordance with paragraph three of subdivision (c) of section 81.16 of this article for such relief. If the annual report sets forth any reasons for a change in the powers authorized by the court, and the guardian fails to act in accordance with this subdivision, any person entitled to commence a proceeding under this article may petition the court for a change in such powers on notice to the guardian and the persons entitled to such notice in accordance with paragraph three of subdivision (c) of section 81.16 of this article for such relief.

S 81.32 EXAMINATION OF INITIAL AND ANNUAL REPORTS.

(a) Examination of reports generally.

1. Initial report. Within thirty days of the filing of the initial report, the initial report filed by a guardian under this article shall be examined.

2. Annual examination. Within thirty days after the filing of the annual report of the preceding year, the annual reports filed by guardians under this article shall be examined to determine the condition and care of the incapacitated person, the finances of the incapacitated person, and the manner in which the guardian has carried out his or her duties and exercised his or her powers.

(b) Examiners. The presiding justice of the appellate division in each department, or a justice of the supreme court or a special referee designated by a majority of the justices of the appellate division in each department at the request of the presiding justice, shall examine, or cause to be examined by persons designated by the presiding justice or the justices as examiners, all such reports.

(c) Failure to report.

1. If a guardian fails to file his or her initial or annual report, the person authorized to examine the report shall demand that the guardian file the report within fifteen days after the service of the demand upon him or her. A copy of the demand shall be served upon the guardian or his or her resident agent by certified mail.

2. Upon failure to comply with such demand, the court, may upon the motion of the court examiner, enter an order requiring compliance with the demand and may deny or reduce the amount of the compensation of the guardian, or remove the guardian pursuant to section 81.35 of this article absent a showing that the guardian has acted in good faith.

(d) Incomplete report.

1. If the person authorized to examine the report is of the opinion that a more complete or satisfactory report should be filed, the person authorized to examine the report shall demand that the guardian file a revised report or proof of any item in the report. A copy of the demand shall be served upon the guardian or his or her resident agent by certified mail.

2. Upon failure to comply with such demand, the court, may upon the motion of the court examiner, enter an order requiring compliance with the demand and may deny or reduce the amount of the compensation of the guardian, or remove the guardian pursuant to section 81.35 of this article absent a showing that the guardian has acted in good faith.

(e) Duty of examiners. The person examining the report may examine the guardian and other witnesses under oath and reduce their testimony to writing. The person examining the report, on five days notice to the guardian, shall file a report in the form and manner prescribed by the order appointing the examiner.

(f) Expenses of examination. The expenses of the examination shall be payable out of the estate of the incapacitated person examined if the estate amounts to five thousand dollars or more, or, if the estate amounts to less than this sum, by the county treasurer of the county or, within the city of New York by the comptroller of the city of New York, out of any court funds in his or her hands.

S 81.33 INTERMEDIATE AND FINAL REPORT.

(a) A guardian may move in the court of his or her appointment for an order permitting him or her to render an intermediate report to the date of the filing thereof in a form prescribed by the court which shall include the same information as is required under section 81.31 of this article. The court may order the report to be filed with the clerk of the court on or before a fixed date.

(b) When a guardian dies or is removed, suspended, discharged pursuant to the provisions of this article, or allowed to resign, the court shall order a final report in a form prescribed by the court which shall include the same information as is required under section 81.31 of this article. When such a report has been made in the course of a proceeding to remove a guardian, the court may dispense with a further report.





(c) Notice of the filing of a report under this section shall be served upon the persons entitled to notice pursuant to paragraph three of subdivision (c) of section 81.16 of this article. If the incapacitated person is deceased, notice shall also be served upon his or her executor or administrator, if any.

(d) The court may appoint counsel for the incapacitated person, if living, for the protection of such person's rights and interests with regard to such report. The court may appoint a referee to hear the matter and report to the court.

(e) Upon the motion for a confirmation of the report of the referee, or if the report is made before the court, upon the court's determination, the report shall be judicially approved and filed. The compensation of the referee and of counsel shall be fixed by the court and shall be payable out of the estate of the incapacitated person unless it is determined that the incapacitated person is indigent.

(f) If the incapacitated person resides in a facility, hospital, school or an alcoholism facility, as those terms are defined in section 1.03 of this chapter, a substance abuse program as that term is defined in section 19.03 of this chapter, an adult care facility as that term is defined in section two of the social services law, or a residential health care facility or a general hospital as those terms are defined in section two thousand eight hundred one of the public health law, a copy of a report under this section shall be served upon the chief executive officer in charge of that facility and upon the mental hygiene legal service of the judicial department in which the residence is located.

S 81.34 DECREE ON FILING INSTRUMENTS APPROVING ACCOUNTS.

(a) The guardian or the personal representative of the guardian may present to the court a petition showing the names and addresses of all persons entitled to receive notice pursuant to paragraph three of subdivision (c) of section 81.16 of this article and showing that, to the extent the guardian is responsible for the property of the incapacitated person, all taxes have been paid or that no taxes are due and that the petitioner has fully reported and has made full disclosure in writing of all the guardian's actions affecting the property of the incapacitated person to all persons interested and seeking a decree releasing and discharging the petitioner.

(b) The petitioner shall also show that the incapacitated person has died or that the guardian has died, or has been removed, suspended, or discharged pursuant to the provisions of this article, or allowed to resign.

(c) The petitioner shall also file with the petition acknowledged instruments executed by all persons interested or in the case of an infant, or incapacitated person whose claim has been paid, by the guardian, or guardian receiving payment, approving the report of the petitioner and releasing and discharging the petitioner.

(d) The court may thereupon make a decree releasing and discharging the petitioner and the sureties on his or her bond, if any, from any further liability to the persons interested.

S 81.35 REMOVAL OF GUARDIAN.

Upon motion, the court appointing a guardian may remove such guardian when the guardian fails to comply with an order, is guilty of misconduct, or for any other cause which to the court shall appear just. Notice of motion shall be served on the guardian and persons entitled to receive notice pursuant to paragraph three of subdivision (c) of section 81.16 of this article. The motion may be made by the person examining initial and annual reports pursuant to section 81.32 of this article, or by any person entitled to commence a proceeding under this article, including the incapacitated person. The court may fix the compensation of any attorney or person prosecuting the motion. It may compel the guardian to pay personally the costs of the motion if granted.

S 81.36 DISCHARGE OR MODIFICATION OF POWERS OF GUARDIAN.

(a) The court appointing the guardian shall discharge such guardian, or modify the powers of the guardian where appropriate, if it appears to the satisfaction of the court that:

1. the incapacitated person has become able to exercise some or all of the powers necessary to provide for personal needs or property management which the guardian is authorized to exercise;
2. the incapacitated person has become unable to exercise powers necessary to provide for personal needs or property management which the guardian is not authorized to exercise;
3. the incapacitated person dies; or
4. for some other reason, the appointment of the guardian is no longer necessary for the incapacitated person, or the powers of the guardian should be modified based upon changes in the circumstances of the incapacitated person.

(b) The application for relief under this section may be made by the guardian, the incapacitated person, or any person entitled to commence a proceeding under this article.

(c) There shall be a hearing on notice to the persons entitled to notice pursuant to paragraph three of subdivision (c) of section 81.16 of this article. If any party to the proceeding raises an issue of fact as to the ability of the incapacitated person to provide for his or her personal needs or property management and demands a jury trial of such issue, the court shall order a trial by jury thereof.

(d) To the extent that relief sought under this section would terminate the guardianship or restore certain powers to the

incapacitated person, the burden of proof shall be on the person objecting to such relief. To the extent that relief sought under this section would further limit the powers of the incapacitated person, the burden shall be on the person seeking such relief.

(e) If the guardian is discharged because the incapacitated person becomes fully able to care for his or her property, the court shall order that there be restored to such person the property remaining in the hands of the guardian. If the incapacitated person dies, the guardian shall provide for such person's burial or other disposition the cost of which shall be borne by the estate of the incapacitated person.

S 81.37 RESIGNATION OR SUSPENSION OF POWERS OF GUARDIAN.

(a) The court appointing a guardian may allow the guardian to resign or may suspend the powers of the guardian.

(b) Where a guardian is engaged in war service as defined in section seven hundred seventeen of the surrogate's court procedure act, the court, upon motion by the guardian or any other person and upon such notice as the court may direct, may suspend the powers of the guardian until further order of the court. If the suspension will leave no other person acting as guardian, the motion shall seek the appointment of a successor. When the suspended guardian becomes able to serve, he or she may be reinstated by the court upon motion and such notice as the court may direct. If the suspended guardian is reinstated, the court shall thereupon discharge his or her successor, who may be required to account, and make any other order as justice requires.

S 81.38 VACANCY IN OFFICE.

(a) Interim guardian. A vacancy created by the death, removal, discharge, resignation, or suspension of a guardian shall be filled by the court. Upon the application of any person entitled to commence a proceeding under this article, the court shall appoint an interim guardian who shall serve for a period of ninety days or until a final accounting is filed and a successor guardian is appointed by the court. The powers and duties of the interim guardian shall be specifically enumerated in the order of appointment. The court may require service of the order to show cause seeking the appointment of an interim guardian on any persons it deems appropriate.

(b) Standby guardian. At the time of the appointment of the guardian, the court may in its discretion appoint a standby guardian to act in the event that the guardian shall resign, die, be removed, discharged, suspended, or become incapacitated. The court may also appoint an alternate and/or successive alternates to the standby guardian, to act if the standby guardian shall resign, die, be removed, discharged, suspended, or become incapacitated. Such standby guardian, or the alternate in the event of the standby guardian's resignation, death, removal, discharge, suspension or adjudication of incapacity, shall without further proceedings be empowered to immediately assume the duties of office immediately upon resignation, death, removal, discharge, suspension or adjudication of incapacity, of the guardian or the standby guardian as set forth in the order of appointment, subject only to the confirmation of appointment by the court sixty days following the assumption of the duties of the office. Before confirming the appointment of a standby guardian, the court may conduct a hearing in accordance with the provisions set forth in section 81.11 of this article upon petition of any person entitled to commence a proceeding under this article.

S 81.39 GUARDIAN EDUCATION REQUIREMENTS.

(a) Each incapacitated person is entitled to a guardian whom the court finds to be sufficiently capable of performing the duties and exercising the powers of a guardian necessary to protect the incapacitated person.

(b) Each person appointed by the court to be a guardian must complete a training program approved by the chief administrator which covers:

1. the legal duties and responsibilities of the guardian;
2. the rights of the incapacitated person;
3. the available resources to aid the incapacitated person;
4. an orientation to medical terminology, particularly that related to the diagnostic and assessment procedures used to characterize the extent and reversibility of any impairment;
5. the preparation of annual reports, including financial accounting for the property and financial resources of the incapacitated person.

(c) The court may, in its discretion, waive some or all of the requirements of this section or impose additional requirements. In doing so, the court shall consider the experience and education of the guardian with respect to the training requirements of this section, the duties and powers assigned to the guardian, and the needs of the incapacitated person.

S 81.40 COURT EVALUATOR EDUCATION REQUIREMENTS.

(a) Each incapacitated person is entitled to a court evaluator whom the court finds to be sufficiently capable of performing the duties of a court evaluator necessary to ensure that all the relevant information regarding a petition for the appointment of a guardian comes before the court and to assist the court in reaching a decision regarding the appointment of a guardian.





(b) Each person appointed by the court to be an evaluator must complete a training program approved by the chief administrator which covers:

1. the legal duties and responsibilities of the court evaluator;
2. the rights of the incapacitated person with emphasis on the due process rights to aid the court evaluator in determining his or her recommendation regarding the appointment of counsel and the conduct of the hearing;
3. the available resources to aid the incapacitated person;
4. an orientation to medical terminology, particularly that related to the diagnostic and assessment procedures used to characterize the extent and reversibility of any impairment;
5. entitlements;
6. psychological and social concerns relating to the disabled and frail older adults.

(c) The court may, in its discretion, waive some or all of the requirements of this section or impose additional requirements. In doing so, the court shall consider the experience and education of the court evaluator with respect to the training requirements of this section.

S 81.41 COURT EXAMINER EDUCATION REQUIREMENTS.

(a) Each incapacitated person is entitled to a thorough examination of all reports required to be filed by the guardian.

(b) Each person appointed pursuant to section 81.32 of this article must complete a training program approved by the chief administrator which covers the legal duties and responsibilities of the examiner and of guardians.

(c) The court may, in its discretion, waive some or all of the requirements of this section or impose additional requirements. In so doing, the court shall consider the experience and education of the court examiner with respect to the training requirements of this section.

S 81.42 COMPLIANCE.

(a) A motion to dismiss based on the alleged failure to comply with any of the provisions of this article, other than subparagraph (i) of paragraph one of subdivision (d) of section 81.07 of this article, must be determined without regard to technical mistakes, deficiencies, and omissions that do not result in actual prejudice that affects the integrity of the proceeding.

(b) A judgment or order made pursuant to this article, unless reversed on appeal, releases the guardian and the sureties from all claims of the incapacitated person and/or any person affected thereby based on any act or omission directly authorized, approved or confirmed in the judgment or order. This section does not apply where the judgment or order is obtained by fraud or conspiracy or by misrepresentation contained in the notice, petition, account, or in the judgment or order as to any material fact. For purposes of this subdivision, misrepresentation of a material fact includes but is not limited to the omission of a material fact.

S 81.43 PROCEEDINGS TO DISCOVER PROPERTY WITHHELD.

(a) To the extent that it is consistent with the authority otherwise granted by the court a guardian may commence a proceeding in the court which appointed the guardian to discover property withheld. The petition shall contain knowledge, or information and belief of any facts tending to show that any interest in real property or money or other personal property, or the proceeds or value thereof, which should be delivered and paid to the guardian, is in the possession, under the control, or within the knowledge or information of respondent who withholds the same from the guardian, whether such possession or control was obtained before or after the appointment of the guardian, or that the respondent refuses to disclose knowledge or information which such person may have concerning the same or which will aid the guardian in making discovery of such property. The petition shall request that respondent be ordered to attend an inquiry and be examined accordingly and deliver property of the incapacitated person if it is within his or her control. The petition may be accompanied by an affidavit or other written evidence, tending to support the allegations thereof. If the court is satisfied on the papers so presented that there are reasonable grounds for the inquiry, it must make an order accordingly, which may be returnable forthwith, or at a future time fixed by the court, and may be served at any time before the hearing. If it shall appear from the petition or from the answer interposed thereto, or in the course of the inquiry made pursuant to the order that a person other than the respondent in the proceeding claims an interest in the property or the proceeds or the value thereof, the court may by the original order or by supplemental order, direct such additional party to attend and be examined in the proceeding in respect of his or her adverse claim, and deliver the property if in his or her control or the proceeds or value thereof. Service of such an order must be made by delivery of a certified copy thereof to the person or persons named therein and the payment or tender, to each of the sum required by law to be paid or tendered to a witness who is subpoenaed to attend a trial in such court.

(b) If the person directed to appear submits an answer denying any knowledge concerning or the possession of any property which belongs to the incapacitated person or should be delivered to the guardian, or shall make default in answer, he or she shall be sworn to answer truly all questions put to him or her regarding the inquiry requested in the petition. Any claim of title to or right to the possession of any property of the incapacitated person must be made by verified answer in writing. If such answer is interposed, the issues raised thereby shall be tried according to the usual practice of the court as

a litigated issue but the interposition of such answer shall not limit the right of the guardian to proceed with the inquiry in respect of property not so claimed by the verified answer. If possession of the property is denied, proof on that issue may be presented to the court by either party. The court may in an appropriate case make interim decrees directing the delivery of property not claimed by verified answer and may continue the proceeding for determination of any litigated issue. If it appears that the guardian is entitled to the possession of the property, the decree shall direct delivery thereof to the guardian or if the property shall have been diverted or disposed of, the decree may direct payment of the proceeds or the value of such property or may impress a trust upon said proceeds or make any determination which a court of equity might decree in following trust property funds. In any case in which a verified answer is served and the court after a trial or hearing determines the issue, the court may in its discretion award costs not exceeding fifty dollars and disbursements to be paid by the unsuccessful party.





NEW YORK STATE CONSOLIDATED LAWS

CHAPTER 45. PUBLIC HEALTH LAW

ARTICLE 28. HOSPITALS

SECTION 2803-C. RIGHTS OF PATIENTS IN CERTAIN MEDICAL FACILITIES.

1. The principles enunciated in subdivision three hereof are declared to be the public policy of the state and a copy of such statement of rights and responsibilities shall be posted conspicuously in a public place in each facility covered hereunder.
2. The commissioner shall require that every nursing home and facility providing health related service, as defined in subdivision two and paragraph (b) of subdivision four of section twenty-eight hundred one of this article, shall adopt and make public a statement of the rights and responsibilities of the patients who are receiving care in such facilities, and shall treat such patients in accordance with the provisions of such statement.
3. Said statement of rights and responsibilities shall include, but not be limited to the following:
 - a. Every patient's civil and religious liberties, including the right to independent personal decisions and knowledge of available choices, shall not be infringed and the facility shall encourage and assist in the fullest possible exercise of these rights.
 - b. Every patient shall have the right to have private communications and consultations with his or her physician, attorney, and any other person.
 - c. Every patient shall have the right to present grievances on behalf of himself or herself or others, to the facility's staff or administrator, to governmental officials, or to any other person without fear of reprisal, and to join with other patients or individuals within or outside of the facility to work for improvements in patient care.
 - d. Every patient shall have the right to manage his or her own financial affairs, or to have at least a quarterly accounting of any personal financial transactions undertaken in his or her behalf by the facility during any period of time the patient has delegated such responsibilities to the facility.
 - e. Every patient shall have the right to receive adequate and appropriate medical care, to be fully informed of his or her medical condition and proposed treatment unless medically contraindicated, and to refuse medication and treatment after being fully informed of and understanding the consequences of such actions.
 - f. Every patient shall have the right to have privacy in treatment and in caring for personal needs, confidentiality in the treatment of personal and medical records, and security in storing personal possessions.
 - g. Every patient shall have the right to receive courteous, fair, and respectful care and treatment and a written statement of the services provided by the facility, including those required to be offered on an as-needed basis.
 - h. Every patient shall be free from mental and physical abuse and from physical and chemical restraints, except those restraints authorized in writing by a physician for a specified and limited period of time or as are necessitated by an emergency in which case the restraint may only be applied by a qualified licensed nurse who shall set forth in writing the circumstances requiring the use of restraint and in the case of use of a chemical restraint a physician shall be consulted within twenty-four hours.
 - i. A statement of the facility's regulations and an explanation of the patient's responsibility to obey all reasonable regulations of the facility and to respect the personal rights and private property of the other patients.
 - j. A statement that should the patient be adjudicated incompetent and not be restored to legal capacity, or if a conservator should be appointed for the patient, the above rights and responsibilities shall be exercised by the appointed committee or conservator in a representative capacity.
 - k. Every patient shall have the right to receive upon request kosher food or food products prepared in accordance with the Hebrew orthodox religious requirements.
 - l. Pursuant to regulations promulgated by the commissioner, no facility or individual and no general hospital providing medical care to persons having been admitted from such facilities or from adult care facilities covered by the provisions of section four hundred sixty-one-b of the social services law, or to applicants for readmission to such facilities or to adult care facilities covered by the provisions of section four hundred sixty-one-b of the social services law, shall restrict or prohibit the access to the facility or general hospital nor interfere with the performance of the official duties, including confidential visits with residents, of duly designated persons participating in the long term care ombudsman program as provided for in sections five hundred forty-four and five hundred forty-five of the executive law.
 - m. Pursuant to regulations promulgated by the commissioner in consultation with the director of the office for the aging, no facility shall restrict or prohibit access by records access ombudsmen specially designated under section five hundred forty-four of the executive law to the medical or personal records of any patient or resident if such patient or resident, or, where appropriate, committee for an incompetent, has given express written consent to such disclosure; provided, however, that

(i) in the case of medical records, disclosure may be exclusive of the personal notes of the physician as defined in such regulations and

(ii) access may be limited to such times as may be specified in such regulations.

Such records shall be made available by a member or members of the facility's staff who shall be designated by the facility to provide access to and, where necessary, interpretation of such records to such records access ombudsman, who shall have the right to photocopy such records. The facility may charge a reasonable fee for photocopying pursuant to such regulations. Disclosure to a records access ombudsman of records of any patient or resident pursuant to the written consent of such patient or resident shall not give rise to any claim against the facility, its staff, or the patient's or resident's physician based solely on the fact of such disclosure pursuant to such written consent. Nothing in this paragraph shall be construed to limit or abridge any right of access to records, including financial records, otherwise available to ombudsmen, patients or residents, or any other person.

n. Pursuant to regulations promulgated by the commissioner in consultation with the director of the office for the aging, no facility or individual shall retaliate or take reprisals against any resident, employee, or other person for having filed a complaint with, or having provided information to, any long term care patient ombudsman functioning in accordance with section five hundred forty-four or five hundred forty-five of the executive law, nor shall any facility or individual interfere with the official duties of any such ombudsman.

Such regulations shall provide for appropriate sanctions with respect to such retaliation, reprisals, or interference.

o. Every patient shall have the right to authorize those family members and other adults who will be given priority to visit consistent with the patient's or resident's ability to receive visitors.

p. A statement informing the patient of his or her right to make organ, tissue or whole body donations, and the means by which the patient may make such a donation. The commissioner shall promulgate any rules and regulations necessary to implement the provisions of this paragraph.

4. Each facility shall give a copy of the statement to each patient at or prior to the time of admission to the facility, or to the appointed personal representative at the time of appointment and to each member of the facility's staff.

5. Each facility shall prepare a written plan and provide appropriate staff training to implement each patient's right included in the statement.

SECTION 2803-D REPORTING ABUSES OF PERSONS RECEIVING CARE OR SERVICES IN RESIDENTIAL HEALTH CARE FACILITIES

1. The following persons are required to report in accordance with this section when they have reasonable cause to believe that a person receiving care or services in a residential health care facility has been physically abused, mistreated or neglected by other than a person receiving care or services in the facility: any operator or employee of such facility, any person who, or employee of any corporation, partnership, organization or other entity which, is under contract to provide patient care services in such facility, and any nursing home administrator, physician, medical examiner, coroner, physician's associate, specialist's assistant, osteopath, chiropractor, physical therapist, occupational therapist, registered professional nurse, licensed practical nurse, dentist, podiatrist, optometrist, pharmacist, psychologist, certified social worker, speech pathologist and audiologist.

2. In addition to those persons required to report suspected physical abuse, mistreatment or neglect of persons receiving care or services in residential health care facilities, any other person may make such a report if he or she has reasonable cause to believe that a person receiving care or services has been physically abused, mistreated or neglected in the facility.

3. Reports of suspected physical abuse, mistreatment or neglect made pursuant to this section shall be made immediately by telephone and in writing within forty-eight hours to the department. Written reports shall be made on forms supplied by the commissioner and shall include the following information: the identity of the person making the report and where he can be found; the name and address of the residential health care facility; the names of the operator and administrator of the facility, if known; the name of the subject of the alleged physical abuse, mistreatment or neglect, if known; the nature and extent of the physical abuse, mistreatment or neglect; the date, time and specific location of the occurrence; the names of next of kin or sponsors of the subject of the alleged physical abuse, mistreatment or neglect, if known; and any other information which the person making the report believes would be helpful to further the purposes of this section. Such written reports shall be admissible in evidence, consistent with the provisions of paragraph (f) of subdivision six of this section, in any actions or proceedings relating to physical abuse, mistreatment or neglect of persons receiving care or services in residential health care facilities. Written reports made other than on forms supplied by the commissioner which contain the information required herein shall be treated as if made on such forms.

4. Any person who in good faith makes a report pursuant to this section shall have immunity from any liability, civil or criminal, for having made such a report. For the purpose of any proceeding, civil or criminal, the good faith of any person required to report instances of physical abuse, mistreatment or neglect of persons receiving care or services in residential health care facilities shall be presumed.

5. Notwithstanding the provisions of section two hundred thirty of this chapter, any licensed person who commits an act of physical abuse, mistreatment or neglect of a person receiving care or services in a residential health care facility and any licensed person required by this section to report an instance of suspected physical abuse, mistreatment or neglect of a per-





son receiving care or services in a residential health care facility who fails to do so shall be guilty of unprofessional conduct in the practice of his or her profession.

6.

- (a) Upon receipt of a report made pursuant to this section, the commissioner shall cause an investigation to be made of the allegations contained in the report. Notification of the receipt of a report shall be made immediately by the department to the appropriate district attorney if a prior request in writing has been made to the department by the district attorney. Prior to the completion of the investigation by the department, every reasonable effort shall be made to notify, personally or by certified mail, any person under investigation for having committed an act of physical abuse, mistreatment or neglect. The commissioner shall make a written determination, based on the findings of the investigation, of whether or not sufficient credible evidence exists to sustain the allegations contained in the report or would support a conclusion that a person not named in such report has committed an act of physical abuse, neglect or mistreatment. A copy of such written determination, together with a notice of the right to a hearing as provided in this subdivision, shall be sent by registered or certified mail to each person who the commissioner has determined has committed an act of physical abuse, neglect or mistreatment. A letter shall be sent to any other person alleged in such report to have committed such an act stating that a determination has been made that there is not sufficient evidence to sustain the allegations relating to such person. A copy of each such determination and letter shall be sent to the facility in which the alleged incident occurred.
- (b) The commissioner may make a written determination, based on the findings of the investigation, that sufficient credible evidence exists to support a conclusion that a person required by this section to report suspected physical abuse, mistreatment or neglect had reasonable cause to believe that such an incident occurred and failed to report such incident. A copy of such written determination, together with a notice of the right to a hearing as provided in this subdivision, shall be sent by registered or certified mail to each person who the commissioner has determined has failed to report as required by this section.
- (c) All information relating to any allegation which the commissioner has determined would not be sustained shall be expunged one hundred twenty days following notification of such determination to the person who made the report pursuant to this section, unless a proceeding pertaining to such allegation is pending pursuant to article seventy-eight of the civil practice law and rules. Whenever information is expunged, the commissioner shall notify any official notified pursuant to paragraph (a) of this subdivision that the information has been expunged.
- (d) At any time within thirty days of the receipt of a copy of a determination made pursuant to this section, a person named in such determination as having committed an act of physical abuse, neglect or mistreatment, or as having failed to report such an incident, may request in writing that the commissioner amend or expunge the record of such report, to the extent such report applies to such person, or such written determination. If the commissioner does not comply with such request within thirty days, such person shall have the right to a fair hearing to determine whether the record of the report or the written determination should be amended or expunged on the grounds that the record is inaccurate or the determination is not supported by the evidence. The burden of proof in such hearing shall be on the department. Whenever information is expunged, the commissioner shall notify any official notified pursuant to paragraph (a) of this subdivision that the information has been expunged.
- (e) Except as hereinafter provided, any report, record of the investigation of such report and all other information related to such report shall be confidential and shall be exempt from disclosure under article six of the public officers law.
- (f) Information relating to a report made pursuant to this section shall be disclosed under any of the following conditions:
 - (i) pursuant to article six of the public officers law after expungement or amendment, if any, is made in accordance with a hearing conducted pursuant to this section, or at least forty-five days after a written determination is made by the commissioner concerning such report, whichever is later; provided, however, that the identity of the person who made the report, the victim, or any other person named, except a person who the commissioner has determined committed an act of physical abuse, neglect or mistreatment, shall not be disclosed unless such person authorizes such disclosure;
 - (ii) as may be required by the penal law or any lawful order or warrant issued pursuant to the criminal procedure law; or
 - (iii) to a person who has requested a hearing pursuant to this section, information relating to the determination upon which the hearing is to be conducted; provided, however, that the identity of the person who made the report or any other person who provided information in an investigation of the report shall not be disclosed unless such person authorizes such disclosure.
- (g) Where appropriate, the commissioner shall report instances of physical abuse, mistreatment or neglect or the failure to report as required by this section, to the appropriate committee on professional conduct for the professions enumerated in subdivision one of this section when a determination has been made after the commissioner has provided an opportunity to be heard. The commissioner shall report instances of physical abuse, mistreatment, neglect or misappropriation of resident property by a nurse aide or other unlicensed individual and any brief statement by the nurse aide or other unlicensed individual disputing the finding to the nursing home nurse aide registry established pursuant to section twenty-eight hundred three-j of this article when a determination has been made after the commissioner has provided an opportunity to be heard.



7. In addition to any other penalties prescribed by law, any person who commits an act of physical abuse, neglect or mistreatment, or who fails to report such an act as provided in this section, shall be deemed to have violated this section and shall be liable for a penalty pursuant to section twelve of this chapter after an opportunity to be heard pursuant to this section.

8. No residential health care facility or officer or employee thereof shall discharge or in any manner discriminate or retaliate against any person in any residential health care facility, or any relative, or sponsor thereof, or against any employee of the facility, or against any other person because such person, relative, legal representative, sponsor or employee has made, or is about to make, a report pursuant to this section, or has testified, or is about to testify, in any proceeding relating to physical abuse, mistreatment or neglect of a person receiving care or services in a residential health care facility. The supreme court may grant injunctive relief to any person subject to such retaliation or discrimination. Any violation of this subdivision shall be punishable pursuant to section twelve of this chapter.

9. No later than March fifteenth of every year the commissioner shall prepare and transmit to the governor and the legislature a report on the incidents of physical abuse, mistreatment and neglect of persons receiving care or services in residential health care facilities. No information concerning any individual or facility shall be disclosed in a report made pursuant to this subdivision, or in any other report, except information which would be available pursuant to article six of the public officers law as provided in this section. Nothing in this section shall be construed to prohibit the maintenance or disclosure of, or require the expungement of, statistical data which would not reveal the identity of any person or facility.

10. An investigation shall be made of each incident reported pursuant to this section, but only the provisions of paragraphs (e) and (f) of subdivision six, and subdivisions two, four, eight and nine shall apply to physical abuse by persons receiving care or services in residential health care facilities.

11. The commissioner shall adopt rules and regulations necessary to implement this section.



NEW YORK STATE CONSOLIDATED LAWS
CHAPTER 55. SOCIAL SERVICES LAW
ARTICLE 7. RESIDENTIAL CARE PROGRAMS FOR ADULTS AND CHILDREN
TITLE 2. RESIDENTIAL PROGRAMS FOR ADULTS

SECTION 461-C. RESIDENT CARE, SERVICES AND CHARGES.

1. Every operator of an adult care facility, except a shelter for adults, shall execute with each applicant for admission a written admission agreement, dated and signed by the operator and the parties to be charged, which shall contain the entire agreement of the parties and such other information as department regulations shall require.

2. Such agreement executed pursuant to subdivision one of this section shall enumerate in such detail as may be required by department regulation all charges, expenses and other assessments, if any, for services, materials, equipment and food, required by law or regulations and other services, materials, equipment and food which such operator agrees to furnish and supply to such resident during the period of residency. No additional charges or expenses may be assessed against any resident of a residence for adults, adult home or enriched housing program, in excess of that contained in such agreement, except

- (a) upon express written approval and authority of the resident, or his or her sponsor, if any, or
- (b) in order to provide additional care, services or supplies, upon the express order of the attending physician of the resident, or
- (c) upon thirty days notice to the resident and to his or her sponsor, if any, of additional charges and expenses due to increased cost of maintenance and operation. However, in the event of any emergency arising which affects such resident, additional charges may be assessed for the benefit of such resident as are reasonable and necessary for services, materials, equipment and food furnished and supplied during such emergency.

2-a.

- (a) There shall be an implied warranty of habitability in each written admission agreement executed pursuant to this section that shall ensure the premises be fit for human habitation and for the uses reasonably intended by the operator and the resident and that the occupants of the facility shall not be subjected to any conditions which would be dangerous, hazardous or detrimental to their life, health, safety or welfare. Such statement shall not be read to be in any way limiting a resident's rights to relief in an administrative or judicial proceeding.
- (b) An action for breach of the warranty of habitability and any violation of a written admission agreement may be maintained in a court of competent jurisdiction by the resident or representative of the resident. The court shall apply New York Rules of Court Part 130 to any action brought pursuant to this section.

3. The written agreement executed pursuant to subdivision one of this section shall include a statement indicating that the resident and any person designated by the resident shall be notified by the operator at the request of the resident pursuant to regulations promulgated by the department and, shall be provided written notification by the facility not less than thirty days prior to a termination of the resident's admission and services agreement; a statement that upon discharge or transfer, the resident and any person designated by the resident shall be notified by the operator at the request of the resident pursuant to regulations promulgated by the department and, is entitled to a final written statement of his or her account and that the resident is entitled to the prompt return, within three business days, of any of his or her money, property or thing of value held in trust or in custody by the facility; a statement which details any and all money, property or thing of value which is given, or promised to be given to the facility on admission or at any other time, including any agreements made by third parties for the benefit of a resident; and such other provisions as the department determines necessary to fully inform the resident of those items of care, services, materials, equipment and food that must be provided by the facility pursuant to other applicable laws and regulations, and the frequency thereof, and any additional items of care, services, materials, equipment and food that the facility may in its discretion agree to provide, and the frequency thereof. Waiver of any provision contained herein by a resident shall be void. Such statement as herein provided shall be annexed to the admission agreement.

4. No resident of an adult care facility who is entitled to receive a personal allowance pursuant to the provisions of section one hundred thirty-one-o of this chapter shall be required to use any of the proceeds from such allowance to pay the operator of an adult care facility for any services or supplies, unless the resident elects to purchase such services or supplies and the department has determined that such services or supplies are not otherwise required to be provided by the operator pursuant to law, regulation or agreement and the charges for such services or supplies are reasonable.

5. Whenever a resident authorizes an operator of an adult care facility or any person affiliated therewith, to exercise control over his or her money, property or thing of value, such authorization shall be in writing and subscribed by the parties to be charged. Any such money, property or thing of value belonging to the resident shall not be mingled with the funds or

become an asset of the person receiving the same, but shall be segregated and recorded on the facility's financial records as independent accounts.

6. No adult care facility shall receive or retain any person who is in need of continual medical or nursing care as provided by facilities licensed pursuant to article twenty-eight of the public health law or articles nineteen, twenty-three, thirty-one and thirty-two of the mental hygiene law.

7.

(a) At the time of the admission to an adult care facility, other than a shelter for adults, a resident shall submit to the facility a written report from a physician, which report shall state:

- (i) that the physician has physically examined the resident within one month and the date of such examination;
- (ii) that the resident is not in need of acute or long term medical or nursing care which would require placement in a hospital or residential health care facility; and
- (iii) that the resident is not otherwise medically or mentally unsuited for care in the facility.

(b) For the purpose of creating an accessible and available record and assuring that a resident is properly placed in such a facility, the physician's report shall also contain the resident's significant medical history and current conditions, the prescribed medication regimen, and recommendations for diet, the assistance needed in the activities of daily living and where appropriate, recommendations for exercise, recreation and frequency of medical examinations.

(c) Such resident shall thereafter be examined by a physician at least annually and shall submit an annual written report from his physician in conformity with the provisions of this subdivision.

8. The department shall promulgate regulations with respect to the safekeeping and administration of medications in any adult care facility subject to the provisions of section four hundred sixty-c of this article, in accordance with applicable provisions of law, and after consultation with the state department of health and appropriate offices of the state department of mental hygiene.

9. The department shall, with the consent of a resident living in a facility which has received the lowest rating for eighteen months from the effective date of this subdivision, pursuant to section four hundred sixty-one-n of this title, present the resident and any person designated by the resident with options on relocating such resident to a facility which has obtained a higher rating, or other housing alternatives.

SECTION 461-D. RIGHTS OF RESIDENTS IN ADULT CARE FACILITIES.

1. The principles enunciated in subdivision three hereof are declared to be the public policy of the state and a copy of such statement of rights and responsibilities shall be posted conspicuously in a public place in each facility covered hereunder.

2. The department shall require that every adult care facility shall adopt and make public a statement of the rights and responsibilities of the residents who are receiving care in such facilities, and shall treat such residents in accordance with the provisions of such statement.

3. Resident rights and responsibilities shall include, but not be limited to the following:

- (a) Every resident's civil and religious liberties, including the right to independent personal decisions and knowledge or available choices, shall not be infringed and the facility shall encourage and assist in the fullest possible exercise of these rights.
- (b) Every resident shall have the right to have private communications and consultations with his or her physician, attorney, and any other person.
- (c) Every resident shall have the right to present grievances on behalf of himself or herself or others, to the facility's staff or administrator, to governmental officials, or to any person without fear of reprisal, and to join with other residents or individuals within or outside of the facility to work for improvements in resident care.
- (d) Every resident shall have the right to manage his or her own financial affairs.
- (e) Every resident shall have the right to have privacy in treatment and in caring for personal needs.
- (f) Every resident shall have the right to confidentiality in the treatment of personal, social, financial and medical records, and security in storing personal possessions.
- (g) Every resident shall have the right to receive courteous, fair, and respectful care and treatment and a written statement of the services provided by the facility, including those required to be offered on an as-needed basis.
- (h) Every resident shall have the right to receive or to send personal mail or any other correspondence without interception or interference by the operator of an adult care facility or any person affiliated therewith.
- (i) Every resident shall have the responsibility to obey all reasonable regulations of the facility and to respect the personal rights and private property of the other residents.
- (j) The facility is required to include on its accident or incident report the resident's version of the events leading to an accident or incident involving such resident, unless the resident objects.





- (k) Every resident shall have the right to authorize those family members and other adults who will be given priority to visit consistent with the resident's ability to receive visitors. Waiver of any provision contained within this subdivision by a resident of an adult care facility shall be void.
4. Every resident of a residence for adults, adult home or enriched housing program, shall be entitled to receive compensation for services performed on behalf of such facility or persons affiliated therewith, and the operator of such facility shall maintain written records stating the duties to be performed, the rate and type of compensation, and the hours and days during which these services will be performed.
5. Each operator shall give a copy of the statement of rights and responsibilities to each resident at or prior to the time of admission to the facility, or to the appointed personal representative and to each member of the facility's staff.
6. An operator or employee of a residence for adults, adult home or enriched housing program or any other entity which is a representative payee of a resident of such facility pursuant to designation by the social security administration or which otherwise assumes management responsibility over the funds of a resident shall maintain such funds in a fiduciary capacity to the resident. Any interest on money received and held for the resident shall be the property of the individual resident.

S.7748 – ASSISTED LIVING REFORM ACT

AN ACT to amend the public health law, the social services law and the state finance law, in relation to enacting the assisted living reform act.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Short title. This act shall be known and may be cited as the “assisted living reform act”.

§ 2. The public health law is amended by adding a new article 46-A to read as follows:

ARTICLE 46-B – ASSISTED LIVING

Title I. Findings and definitions (§§ 4650-4651).

Title II. Assisted living (§§ 4652-4653).

Title III. Enhanced assisted living certificate (§§ 4654-4655).

Title IV. General requirements (§§ 4656-4663).

TITLE I – FINDINGS AND DEFINITIONS

Section 4650. Legislative purpose and findings.

4651. Definitions.

§ 4650. Legislative purpose and findings. The legislature hereby finds and declares that congregate residential housing with supportive services in a home-like setting, commonly known as assisted living, is an integral part of the continuum of long term care. Further, the philosophy of assisted living emphasizes aging in place, personal dignity, autonomy, independence, privacy and freedom of choice. The intent of this article is to create a clear and flexible statutory structure for assisted living that provides a definition of assisted living residence; that requires licensure of the residence; that requires a written residency agreement that contains consumer protections; that enunciates and protects resident rights; and that provides adequate and accurate information for consumers, which is essential to the continued development of a viable market for assisted living. Entities which hold themselves out as assisted living residences must apply for licensure and be approved by the state to operate as assisted living residences pursuant to this article, and must comply with the requirements of this article.

§ 4651. Definitions. As used in this article:

1. “Assisted living” and “assisted living residence” means an entity which provides or arranges for housing, on-site monitoring, and personal care services and/or home care services (either directly or indirectly), in a home-like setting to five or more adult residents unrelated to the assisted living provider. An applicant for licensure as assisted living that has been approved in accordance with the provisions of this article must also provide daily food service, twenty-four hour on-site monitoring, case management services, and the development of an individualized service plan for each resident. An operator of assisted living shall provide each resident with considerate and respectful care and promote the resident’s dignity, autonomy, independence and privacy in the least restrictive and most home-like setting commensurate with the resident’s preferences and physical and mental status.

Assisted living and enhanced assisted living shall not include:

- (a) residential health care facilities or general hospitals licensed under article twenty-eight of this chapter;
- (b) continuing care retirement communities which possess a certificate of authority pursuant to article forty-six of this chapter, unless the continuing care retirement community is operating an assisted living residence as defined under this section;
- (c) residential services for persons that are provided under a license pursuant to article sixteen, nineteen, thirty-one or thirty-two of the mental hygiene law or other residential services primarily funded by or primarily under the jurisdiction of the office for mental health;
- (d) naturally occurring retirement communities, as defined in section five hundred thirty-six-g of the executive law;
- (e) assisted living programs approved by the department pursuant to section four hundred sixty-one-l of the social services law;
- (f) public or publicly assisted multi-family housing projects administered or regulated by the U.S. department of housing and urban development or the division of housing and community renewal or funded through the homeless housing assistance program that were designed for the elderly or persons with disabilities, or homeless persons, provided such entities do not provide or arrange for home care, twenty-four hour supervision or both, beyond providing periodic coordination or arrangement of such services for residents at no charge to residents. Except, however, such entities that are





in receipt of grants for conversion of elderly housing to assisted living facilities pursuant to section 1701-q-2 of the United States Code shall license as an assisted living pursuant to this article;

- (g) an operating demonstration as such term is defined in paragraph (d) of subdivision one of section four thousand four hundred three-f of this chapter;
- (h) hospice and hospice residences as defined pursuant to section four thousand two of this chapter;
- (i) an adult care facility as defined in subdivision twenty-one of section two of the social services law that is not utilizing the term assisted living (or any derivation thereof) or is not required to obtain an enhanced assisted living certificate; and
- (j) independent senior housing, shelters or residences for adults.

For purposes of this article and for purposes of determining certification pursuant to article seven of the social services law, the department shall by regulation, define independent senior housing, provided such definition shall be based on whether the operator does not provide, arrange for, or coordinate personal care services or home care services on behalf of residents; and the facility does not provide case management services in a congregate care setting for residents. Nothing in this chapter shall preclude a resident of independent senior housing from personally and directly obtaining private personal care or home care services from a licensed or certified home care agency.

2. "Applicant" shall mean the entity which submits an assisted living licensure application with the department pursuant to title two or three of this article.

3. "Adult home" means an adult home as defined by subdivision twenty-five of section two of the social services law.

4. "Enriched housing program" means an enriched housing program, as defined in subdivision twenty-eight of section two of the social services law.

5. "Assisted living operator" or "operator" means a person, persons or an entity which has obtained the written approval of the department to operate an assisted living residence in accordance with this article.

6. "Controlling person" means any person who by reason of a direct or indirect ownership interest, whether of record or beneficial, has the ability, acting either alone or in concert with others with ownership interests, to direct or cause the direction of the management or policies of said corporation, partnership or other entity.

7. "Resident" means an adult not related to the provider, who, pursuant to a residency agreement with a provider resides in an assisted living or enhanced assisted living residence, as applicable.

8. "Resident's representative" means a family member or other individual identified in the residency agreement required under section four thousand six hundred fifty-eight of this article who is authorized by a resident to communicate with residence employees regarding the health, well-being, needs of and services provided to such resident and to assist the resident in obtaining needed services.

9. "Resident's legal representative" means a person duly authorized under applicable state law to act on behalf of a resident. Such legal representative could include, but is not necessarily limited to, a court appointed guardian, an attorney in-fact under a durable power of attorney, an agent under a health care proxy or a representative payee, depending upon the action to be taken.

10. "Home care services" means the services defined in subdivision one of section three thousand six hundred two of this chapter, as provided by a home care services agency which has been approved to operate pursuant to article thirty-six of this chapter.

11. "Individualized service plan" or "ISP" means a written plan developed pursuant to section four thousand six hundred fifty-nine of this article.

12. "Monitoring" means an ability of the assisted living provider to respond to urgent or emergency needs or requests for assistance with appropriate staff, at any hour of any day or night of the week. Such monitoring must be provided on site.

13. "Aging in place" means, care and services at a facility which possesses an enhanced assisted living certificate which, to the extent practicable, within the scope of services set forth in the written residency agreement executed pursuant to section four thousand six hundred fifty-eight of this article, accommodates a resident's changing needs and preferences in order to allow such resident to remain in the residence as long as the residence is able and authorized to accommodate the resident's current and changing needs. A residence that does not possess an enhanced assisted living certificate shall not be deemed able to accommodate a resident's needs if the resident requires or is in need of either enhanced assisted living or twenty-four hour skilled nursing care or medical care provided by facilities licensed pursuant to article twenty-eight of this chapter or articles nineteen, thirty-one or thirty-two of the mental hygiene law.

14. "Enhanced assisted living" or "enhanced assisted living resident" means the care or services provided, or a resident who is provided the care and services, pursuant to an enhanced assisted living certificate.

15. "Enhanced assisted living certificate" means a certificate issued by the department which authorizes an assisted living residence to provide aging in place by retaining residents who desire to continue to age in place and who: (a) are chronically chairfast and unable to transfer, or chronically require the physical assistance of another person to transfer; (b) chronically require the physical assistance of another person in order to walk; (c) chronically require the physical assistance of another person to climb or descend stairs; (d) are dependent on medical equipment and require more than intermittent or occasional assistance from medical personnel; or (e) has chronic unmanaged urinary or bowel incontinence.

TITLE II – ASSISTED LIVING

Section 4652. General requirements; applicability of laws to assisted living.

4653. Licensure procedures and requirements for assisted living.

§ 4652. General requirements; applicability of laws to assisted living. Adult homes and enriched housing programs which possess a valid operating certificate issued pursuant to title two of article seven of the social services law, may call themselves assisted living provided they:

1. file an application for licensure and are approved by the department as assisted living;
2. comply with all the requirements of this article.

§ 4653. Licensure procedures and requirements for assisted living. In order to operate as assisted living, an operator shall be licensed as an adult home or enriched housing program and apply and be approved for licensure with the commissioner pursuant to this article. The operator shall provide, on an application form developed by the commissioner, the following information to the commissioner in order to be licensed:

1. business name, street address, and mailing address of the residence and of the owners of the residence;
2. status of current operating certificate;
3. verification that the operator has a valid residency agreement in compliance with this article to be entered into with each resident, resident's representative and resident's legal representative, if any, and shall include a copy of the information to be included in the residency agreement and disclosures as required pursuant to the provisions of section four thousand six hundred fifty-eight of this article that will be given to prospective residents; and
4. any other information the department may deem necessary for the evaluation of the application provided such information is not duplicative of what is otherwise required of the applicant in obtaining an adult care facility license.

TITLE III – ENHANCED ASSISTED LIVING CERTIFICATE

Section 4654. General requirements; applicability of laws to enhanced assisted living.

4655. Certification procedures and requirements.

§ 4654. General requirements; applicability of laws to enhanced assisted living. Nothing in this article shall require a residence to obtain an enhanced assisted living certificate pursuant to this title unless such residence elects to provide aging in place by retaining residents described in subdivision fifteen of section four thousand six hundred fifty-one of this article.

§ 4655. Certification procedures and requirements.

1. Notwithstanding any other provision of law, an assisted living operator may apply to the department to obtain an enhanced assisted living certificate pursuant to this section.

(a) Such application shall be on a form approved by the department.

(b) An assisted living operator may apply for such a certificate for the entire facility or any number of beds at the facility.

(c) To obtain an enhanced assisted living certificate, the applicant must submit a plan to the department setting forth how the additional needs of residents will be safely and appropriately met at such residence. Such plan shall include, but need not be limited to, a written description of services, staffing levels, staff education and training, work experience, and any environmental modifications that have been made or will be made to protect the health, safety and welfare of such persons in the residence.

(d) In addition to any other requirements of assisted living, an operator of enhanced assisted living may hire care staff directly pursuant to standards developed by the department or contract with a home care services agency which has been approved to operate pursuant to article thirty-six of this chapter.

(e) No assisted living residence shall be certified as enhanced assisted living unless and until the applicant obtains the written approval of the department.

2. No resident shall be permitted to continue to age in place under the terms of an enhanced assisted living certificate unless the operator, the resident's physician, and, if applicable, the resident's licensed or certified home care agency, agree that the additional needs of the resident can be safely and appropriately met at the residence. A resident eligible for enhanced assisted living or his or her representative shall submit to the residence a written report from a physician, which report shall state that:

(a) the physician has physically examined the resident within the last month; and

(b) the resident is not in need of twenty-four hour skilled nursing care or medical care which would require placement in a hospital or residential health care facility.

3. The residence must notify a resident that, while the residence will make reasonable efforts to facilitate the resident's ability to age in place pursuant to an individualized service plan, there may be a point reached where the needs of the resident cannot be safely or appropriately met at the residence, requiring the transfer of the resident to a more appropriate facility in accordance with the provisions of this article.





4. If a resident reaches the point where he or she is in need of twenty-four hour skilled nursing care or medical care required to be provided by facilities licensed pursuant to article twenty-eight of this chapter or article nineteen, thirty-one or thirty-two of the mental hygiene law, then the resident must be discharged from the residence and the operator shall initiate proceedings for the termination of the residency agreement of such resident in accordance with the provisions of section four hundred sixty-one-h of the social services law. Provided, however, a resident may remain at the residence if each of the following conditions are met:

(a) a resident in need of twenty-four hour skilled nursing care or medical care hires appropriate nursing, medical or hospice staff to care for his or her increased needs;

(b) the resident's physician and home care services agency both determine and document that, with the provision of such additional nursing, medical or hospice care, the resident can be safely cared for in the residence, and would not require placement in a hospital, nursing home or other facility licensed under article twenty-eight of this chapter or article nineteen, thirty-one or thirty-two of the mental hygiene law;

(c) the operator agrees to retain the resident and to coordinate the care provided by the operator and the additional nursing, medical or hospice staff; and

(d) the resident is otherwise eligible to reside at the residence.

5. In addition to the requirements otherwise required for licensure as assisted living, any residence that advertises or markets itself as serving individuals with special needs, including, but not limited to, individuals with dementia or cognitive impairments, must submit a special needs plan to the department setting forth how the special needs of such residents will be safely and appropriately met at such residence. Such plan shall include, but need not be limited to, a written description of specialized services, staffing levels, staff education and training, work experience, professional affiliations or special characteristics relevant to serving persons with special needs, and any environmental modifications that have been made or will be made to protect the health, safety and welfare of such persons in the residence. In approving an application for special needs certification, the department shall develop standards to ensure adequate staffing and training in order to safely meet the needs of the resident. The standards shall be based upon recommendations of the task force established by section five of the chapter of the laws of two thousand four which added this section. No residence shall market themselves as providing specialized services unless and until the department has approved such applicant for a special needs assisted living certificate.

6. An enhanced assisted living certificate shall not be required of an adult care facility, or part thereof, which has obtained approval by the department to operate an assisted living program pursuant to section four hundred sixty-one-l of the social services law. Provided, however, such exemption shall only apply to those beds at the facility which are subject to the assisted living program.

TITLE IV – GENERAL REQUIREMENTS

Section 4656. General requirements; applicability of laws to assisted living and enhanced assisted living.

4657. Residency admission.

4658. Residency agreement and disclosures.

4659. Individualized service plan.

4660. Rights of residents in assisted living residences.

4661. Resident funds.

4662. Powers of the commissioner.

4663. Penalties and enforcement.

§ 4656. General requirements; applicability of laws to assisted living and enhanced assisted living. 1. No entity shall establish, operate, provide, conduct, or offer assisted living in this state, or hold itself out as an entity which otherwise meets the definition of assisted living or advertise itself as assisted living or by a similar term, without obtaining the approval of the department to operate as an adult care facility pursuant to title two of article seven of the social services law, obtaining the approval of the department as required in this article, and otherwise acting in accordance with this article. Provided however that an entity may simultaneously apply for approval to operate as an adult care facility and as an assisted living residence pursuant to this article. This subdivision shall not apply to assisted living programs approved by the department pursuant to section four hundred sixty-one-l of the social services law.

2. An assisted living operator shall comply with all applicable statutes, rules and regulations required for maintaining a valid operating certificate issued pursuant to title two of article seven of the social services law and shall obtain and maintain all other licenses, permits, registrations, or other governmental approvals required in addition to requirements under this article.

3. Approval for licensure or certification pursuant to this article may be granted only to an applicant who satisfactorily demonstrates:

(a) that such applicant possesses a valid operating certificate to operate as an adult home or enriched housing program pursuant to article seven of the social services law. An applicant that does not currently possess such operating certificate as an adult home or enriched housing program may simultaneously apply and be approved for such certificate

and all other licenses and certifications authorized under this article; (b) that such applicant which has an existing valid adult care facility operating certificate, is in good standing with the department. For purposes of this subdivision, good standing shall mean the applicant has not (i) received any official written notice from the department of a proposed revocation, suspension, denial or limitation on the operating certificate of the facility or residence; (ii) within the previous three years, been assessed a civil penalty after a hearing conducted pursuant to subparagraph one of paragraph (b) of subdivision seven of section four hundred sixty-d of the social services law for a violation that has not been rectified; (iii) within the previous year, received any official written notice from the department of a proposed assessment of a civil penalty for a violation described in subparagraph two of paragraph (b) of subdivision seven of section four hundred sixty-d of the social services law; (iv) within the previous three years, been issued an order pursuant to subdivisions two, five, six, or eight of section four hundred sixty-d of the social services law; (v) within the previous three years, been placed on, and if placed on, removed from the department's "do not refer list" pursuant to subdivision fifteen of section 460-d of the social services law. Provided however that in the case of an applicant which otherwise meets the requirements of this section, but is not in good standing as provided in this paragraph, the department may approve said applicant if it determines that the applicant is of good moral character and is competent to operate the residence. Such character and competence review shall be limited to applicants not in good standing pursuant to this paragraph or an applicant subject to paragraph (f) of this subdivision. As part of the review provided pursuant to this paragraph, the department shall, on its webpage, solicit and consider public comment;

(c) that such applicant has adequate financial resources to provide such assisted living as proposed;

(d) that the building, equipment, staff, standards of care and records to be employed in the operation comply with applicable statutes and any applicable local law;

(e) that any license or permit required by law for the operation of such residence has been issued to such operator; and

(f) in the case of an applicant which does not have an existing valid adult care facility operating certificate, such applicant shall otherwise comply with the provisions for certification as prescribed by article seven of the social services law.

4. The department shall develop an expedited review and approval process.

5. The knowing operation of an assisted living or enhanced assisted living residence without the prior written approval of the department shall be a class A misdemeanor.

6. Every assisted living residence that is required to possess an assisted living residence license shall be licensed on a biennial basis and shall pay a biennial licensure fee. Such fee shall be five hundred dollars per license, with an additional fee of fifty dollars per resident whose annual income is above four hundred percent of the federal poverty level. Such additional fee shall be based on the total occupied beds at the time of application, up to a maximum biennial licensure fee of five thousand dollars. Said fee shall be in addition to the fee charged by the department for certification as an adult care facility. Every assisted living residence that applies for an enhanced assisted living certificate or a special needs assisted living certificate shall pay an additional biennial fee, in addition to any other fee required by this subdivision, in the amount of two thousand dollars, provided that for any residence applying for both an enhanced assisted living certificated and a special needs assisted living certificate the amount of such fee shall be three thousand dollars.

7. The requirements of this article shall be in addition to those required of an adult care facility. In the event of a conflict between any provision of this article and a provision of article seven of the social services law or a regulation adopted thereunder, the applicable provision of this article or the applicable regulation shall supersede article seven of the social services law or the applicable regulation thereunder to the extent of such conflict.

8. The assisted living operator shall not use deceptive or coercive marketing practices to encourage residents or potential residents to sign or reauthorize the residency agreement required pursuant to section four thousand six hundred fifty-eight of this article.

§ 4657. Residency admission. 1. An assisted living operator shall conduct an initial pre-admission evaluation of a prospective resident to determine whether or not the individual is appropriate for admission to the assisted living residence. Such evaluation shall be conducted by the operator and, if necessary, in conjunction with a home care services agency or appropriate employee pursuant to paragraph (d) of subdivision one of section four thousand six hundred fifty-five of this article. The operator shall conduct all such evaluations using an evaluation tool developed by the department, to be based on the recommendations of the task force created pursuant to section five of the chapter of the laws of two thousand four which added this section or one developed by the operator that receives approval by the department.

2. The assisted living operator shall not admit any resident if the operator is not able to meet the care needs of the resident within the scope of services authorized under this article, and the individualized service plan; provided, further that no operator shall admit any resident in need of twenty-four hour skilled nursing care.

§ 4658. Residency agreement and disclosures.

1. Every operator shall execute with each resident a written residency agreement, in no less than twelve point type and written in plain language, which satisfies the requirements of this section. Such agreement shall:

(a) be dated and signed by the operator, the resident, resident's representative, and resident's legal representative, if any, and any other party to be charged under the agreement;

(b) contain the entire agreement of the parties and shall include the disclosures required by subdivision three of this section.





1-a. The resident, resident's representative and resident's legal representative, if any, shall be given a complete copy of the agreement and all supporting documents and attachments and any changes whenever changes are made to the agreement.

2. The residency agreement shall include, at a minimum:

- (a) the name, telephone number, street address and mailing address of the residence;
- (b) the name and mailing address of the owner of the residence and at least one natural person authorized to accept personal service on behalf of the owner of the residence;
- (c) the name and address of the assisted living operator and at least one natural person authorized to accept personal service on behalf of the operator;
- (d) a statement, to be updated as necessary, describing the licensure or certification status of the assisted living operator and any provider offering home care services or personal care services under an arrangement with the residence, including a specific listing of such providers;
- (e) the effective period of the agreement;
- (f) a description of the services to be provided to the resident and the base rate to be paid by the resident for those services;
- (g) a description of any additional services available for an additional, supplemental, or community fee from the assisted living operator directly or through arrangements with the operator, stating who would provide such services, if other than such operator;
- (h) a rate or fee schedule, including any additional, supplemental, or community fees charged for services provided to the resident, with a detailed explanation of which services and amenities are covered by such rates, fees, or charges;
- (i) a description of the process through which the agreement may be modified, amended, or terminated, and setting forth the terms and time frames under which the agreement may be terminated by either party;
- (j) a description of the complaint resolution process available to residents;
- (k) the name of the resident's representative and resident's legal representative, if any, and a description of the representative's responsibilities;
- (l) the criteria used by the operator to determine who may be admitted and who may continue to reside in the residence, including criteria related to the resident's care needs and compliance with reasonable rules of the residence;
- (m) procedures and standards for termination of contract, discharge and transfer to another dwelling or facility;
- (n) billing and payment procedures and requirements;
- (o) procedures in the event the resident, resident's representative or resident's legal representative are no longer able to pay for services provided for in the resident agreement or for additional services or care needed by the resident; and
- (p) terms governing the refund of any previously paid fees or charges in the event of a resident's discharge from the assisted living residence or termination of the resident agreement.

3. In conjunction with any marketing materials and with the residency agreement required by this section, the assisted living operator shall disclose on a separate information sheet in plain language and in twelve point type the following to (a) any individual who expresses an interest in residing in the residence, and to his or her designated representative and his or her legal representative, if any, upon request or prior to admission, whichever occurs first, and (b) any current resident and to his or her designated representative and his or her legal representative, if any, if such information has not previously been disclosed to them:

- (i) the consumer information guide developed by the commissioner pursuant to subdivision one of section forty-six hundred sixty-two of this article;
- (ii) a statement listing the residence's licensure and if it has an enhanced assisted living certificate and/or special needs enhanced assisted living certificate and the availability of enhanced assisted living and/or special needs beds;
- (iii) any ownership interest in excess of ten percent on the part of the operator, whether legal or beneficial, in any entity which provides care, material, equipment or other services to residents;
- (iv) any ownership interest in excess of ten percent on the part of any entity which provides care, material, equipment or other services to residents, whether legal or beneficial, in the operator;
- (v) a statement regarding the ability of residents to receive services from service providers with whom the operator does not have an arrangement;
- (vi) a statement that residents shall have the right to choose their health care providers, notwithstanding any other agreement to the contrary;
- (vii) a statement regarding the availability of public funds for payment for residential, supportive or home health services including, but not limited to availability of coverage of home health services under title eighteen of the federal social security act (Medicare);
- (viii) the department's toll free telephone number for reporting of complaints regarding home care services and the services provided by the assisted living operator; and

(ix) a statement regarding the availability of long term care ombudsman services and the telephone number of the local and state long term care ombudsman.

4. Assisted living residency agreements and related documents executed by each resident, resident's representative or resident's legal representative shall be maintained by the operator in files from the date of execution until three years after the agreement is terminated. The agreements shall be made available for inspection by the commissioner upon request at any time.

§ 4659. Individualized service plan. 1. A written individualized service plan shall be developed for each resident of an assisted living residence upon admission.

2. The individualized service plan shall be developed with the resident, the resident's representative and resident's legal representative if any, the assisted living operator, and if necessary a home care services agency. The initial individualized service plan shall be developed in consultation with the resident's physician; provided such consultation is documented in writing by the residence. If a resident is determined by his or her physician not to be in need of home care services, the participation of a home care services agency in an evaluation conducted pursuant to this paragraph shall not be necessary.

3. The individualized service plan shall be developed in accordance with the medical, nutritional, rehabilitation, functional, cognitive and other needs of the resident.

4. The individualized service plan shall include the services to be provided, and how and by whom services will be provided and accessed.

5. The individualized service plan shall be reviewed and revised as frequently as necessary to reflect the changing care needs of the resident, but no less frequently than every six months. To the extent necessary, such review and revision shall be undertaken in consultation with the resident's physician.

§ 4660. Rights of residents in assisted living residences. 1. The principals enunciated in subdivision three of this section are declared to be the public policy of the state and a copy of such statement of rights and responsibilities shall be posted conspicuously in a public place in each residence covered hereunder.

2. Every assisted living residence shall adopt and make public a statement of the rights and responsibilities of the residents residing in such residence, and shall treat such residents in accordance with the provisions of such statement.

3. Resident's rights and responsibilities shall include, but not be limited to the following:

(a) every resident's participation in assisted living shall be voluntary, and prospective residents shall be provided with sufficient information regarding the residence to make an informed choice regarding participation and acceptance of services;

(b) every resident's civil and religious liberties, including the right to independent personal decisions and knowledge of available choices, shall not be infringed;

(c) every resident shall have the right to have private communications and consultations with his or her physician, attorney, and any other person;

(d) every resident, resident's representative and resident's legal representative, if any, shall have the right to present grievances on behalf of himself or herself or others, to the residence's staff, administrator or assisted living operator, to governmental officials, to long term care ombudsmen or to any other person without fear of reprisal, and to join with other residents or individuals within or outside of the residence to work for improvements in resident care;

(e) every resident shall have the right to manage his or her own financial affairs;

(f) every resident shall have the right to have privacy in treatment and in caring for personal needs;

(g) every resident shall have the right to confidentiality in the treatment of personal, social, financial and medical records, and security in storing personal possessions;

(h) every resident shall have the right to receive courteous, fair and respectful care and treatment and a written statement of the services provided by the residence, including those required to be offered on an as-needed basis;

(i) every resident shall have the right to receive or to send personal mail or any other correspondence without interception or interference by the operator or any person affiliated therewith;

(j) every resident shall have the right not to be coerced or required to perform the work of staff members or contractual work;

(k) every resident shall have the right to have security for any personal possessions if stored by the operator;

(l) every resident shall have the right to receive adequate and appropriate assistance with activities of daily living, to be fully informed of their medical condition and proposed treatment, unless medically contraindicated, and to refuse medication, treatment or services after being fully informed of the consequences of such actions, provided that an operator shall not be held liable or penalized for complying with the refusal of such medication, treatment or services by a resident who has been fully informed of the consequences of such refusal;

(m) every resident and visitor shall have the responsibility to obey all reasonable regulations of the residence and to respect the personal rights and private property of the other residents;





(n) every resident shall have the right to include their signed and witnessed version of the events leading to an accident or incident involving such resident in any report of such accident or incident;

(o) every resident shall have the right to receive visits from family members and other adults of the resident's choosing without interference from the assisted living residence; and

(p) every resident shall have the right to written notice of any fee increase not less than forty-five days prior to the proposed effective date of the fee increase, provided however providing additional services to a resident shall not be considered a fee increase pursuant to this paragraph.

Waiver of any provision contained within this subdivision shall be void;

4. Each assisted living operator shall give a copy of the statement of rights and responsibilities to each resident at or prior to the time of admission to the residence, the resident's representative and resident's legal representative, if any, and to each member of the residence's staff and any current resident.

§ 4661. Resident funds. An assisted living operator or employee of a residence or any other entity which is a representative payee of a resident of such residence pursuant to designation by the social security administration or which otherwise assumes management responsibility over the funds of a resident shall maintain such funds in a fiduciary capacity to the resident. Any interest on money received and held for the resident shall be the property of the individual resident.

§ 4662. Powers of the commissioner. 1. The commissioner is hereby authorized to:

(a) develop, in consultation with the director of the state office for the aging, consumers, operators of assisted living residences and home care service agency providers, a consumer information guide to inform and assist the consumer in the selection of an assisted living residence;

(b) promulgate, in consultation with the director of the state office for the aging, such rules and regulations as are necessary to implement the provisions of this article;

(c) receive and investigate complaints regarding the condition, operation and quality of care of any entities holding themselves out as assisted living, or advertising themselves by a similar term;

(d) make necessary investigations to procure information required to implement the provisions of this article; and

(e) exercise all other powers and functions as are necessary to implement the provisions of this article.

2. Nothing in this section shall restrict the availability of powers otherwise available to the commissioner under the provisions of this chapter and under the social services law.

§ 4663. Penalties and enforcement. Any person who violates any provision of this article or any rule or regulation promulgated by the department, or the terms or conditions of any order or permit issued by the department pursuant to this article, shall be subject to the maximum penalties which may be levied against a licensed adult care facility.

§ 3. Subdivision 25 of section 2 of the social services law, as added by chapter 601 of the laws of 1981, is amended to read as follows:

25. An adult home shall mean an adult care facility established and operated for the purpose of providing long-term residential care, room, board, housekeeping, personal care, (either directly or indirectly), and supervision to five or more adults unrelated to the operator. The provisions of this subdivision shall not apply to any housing projects established pursuant to the private housing finance law, the public housing law, the membership corporations law or the not-for-profit corporation law except for those distinct programs operated by such projects which provide supervision and/or personal care and which are approved or certified by the department.

§ 4. The state finance law is amended by adding a new section 99-1 to read as follows:

§ 99-1. Assisted living residence quality oversight fund. 1. There is hereby established in the joint custody of the comptroller and the commissioner of health a special fund to be known as the "assisted living residence quality oversight fund".

2. Such fund shall consist of all moneys collected by the department of health pursuant to article forty-six-B of the public health law. Any interest earned by the investment of moneys in such fund shall be added to such fund, become a part of such fund, and be used for the purpose of such fund.

3. Moneys of such fund shall be available to the department of health for the purpose of carrying out the provisions of article forty-six-B of the public health law. Additionally, five hundred thousand dollars shall be available to the state office for the aging for the long term care ombudsman program for the purpose of carrying out the provisions of article forty-six-B of the public health law.

4. The moneys of the fund shall be paid out on the audit and warrant of the comptroller on vouchers certified or approved by the commissioner of health.

§ 5. A task force on adult care facilities and assisted living residences is hereby created, and shall consist of ten members to be appointed as follows: six members shall be appointed by the Governor, two members shall be appointed by the temporary president of the senate, and two members shall be appointed by the speaker of the assembly. The purpose of such task force, which shall be convened not later than December 1, 2004, shall be to update and revise the requirements and regulations applicable to adult care facilities and assisted living residences to better promote resident choice, autonomy and independence. Ex officio members of the task force shall include the commissioner of health, the director of the state office for the aging, the commissioner of the office of mental health, the chair of the commission on quality



of care for the mentally disabled, or their designees. The task force shall gather information regarding the various ways in which existing requirements and guidelines unduly infringe on affordability of care and services, individual resident choice, autonomy and independence, examine and evaluate such requirements and guidelines, and make recommendations to improve them so that they achieve their desired objectives for the resident populations they are designed to protect without infringing upon the choice, autonomy and independence of other residents. Such recommendations shall include, but not be limited to: (a) minimizing duplicative or unnecessary regulatory oversight; (b) ensuring that the indigent have adequate access to, and that there are a sufficient number of enhanced assisted living residences; (c) developing affordable assisted living; (d) promoting resident choice and independence; (e) the evaluation tool as required by section 4657 of the public health law; and, (f) specific standards and criteria relating to the special needs certificates required by section 4655 of the public health law. The task force shall issue a report of its findings and recommendations to the governor and legislature on or before June 1, 2005 and annually thereafter.

§ 6. Any entity which qualifies as an assisted living residence pursuant to article 46-B of the public health law as added by section two of this act and operating as an assisted living residence on or before the effective date of this act shall within sixty days of such effective date apply to be licensed or certified with the commissioner of health in accordance with article 46-B of the public health law as added by section two of this act and shall be required to comply with the provisions of article 46-B of the public health law as added by section two of this act upon approval of all licenses and certifications for which the entity has applied during such period.

§ 7. The department of health shall not be authorized to issue emergency regulations in regard to article 46-B of the public health law.

§ 8. This act shall take effect on the one hundred twentieth day after it shall have become a law; provided, however, that effective immediately, the addition, amendment and/or repeal of any rule or regulation necessary for the implementation of this act on its effective date is authorized and directed to be made and completed on or before such date.

NEW YORK STATE SENATE INTRODUCER'S MEMORANDUM IN SUPPORT

submitted in accordance with Senate Rule VI. Sec 1

BILL NUMBER: S7748

SPONSOR: MAZIARZ

TITLE OF BILL: An act to amend the public health law, the social services law and the state finance law, in relation to enacting the assisted living reform act

SUMMARY OF PROVISIONS: This measure, the "Assisted Living Reform Act," creates a true assisted living law for the first time in New York. Among its many provisions, it:

- * defines assisted living and assisted living residences as separate from adult homes,
- * allows aging in place only at enhanced assisted living facilities,
- * makes provision for care of special populations,
- * requires look-a-Likes to become licensed or face serious criminal penalties (class A misdemeanor, plus civil penalties), and provides incentives if they apply for licensure quickly,
- * requires individualized service plans dealing with the medical, nutritional, rehabilitation, functional, cognitive and other needs of the resident, reviewed every six months, for each resident in an assisted living facility. These are developed with the resident, the resident's representative and legal representative, the assisted living operator, a home care services agency (if necessary), and in consultation with the resident's physician,
- * requires written residency agreements in plain language and in 12-point type, that must cover at least 16 separate items of information, including a description of the services to be provided and fees to be charged; the statute also requires that the agreement be provided in full to the resident again any time there is a change in fees,
- * creates an enforcement fund from the licensure fees and fines paid by the facilities, to be used for oversight and enforcement,
- * requires full disclosure to consumers and their families interested in locating to an assisted living facility of at least nine points of information, including ownership by the facility operator (in excess of 10%) of any company which provides goods or services to residents, as well as ownership by any such company in the facility,
- * a clear directive that residents have the right to choose their health care providers, notwithstanding any other agreement to the contrary,
- * establishes a 16-point residents bill of rights,
- * requires the commissioner to develop a consumer information guide to inform and assist the consumer in the selection of assisted living residence; the guide is to be developed with in consultation with the director of the state office for the aging, consumers, operators of assisted living residences and home care service agency providers, and
- * creates a permanent, ongoing task force to deal with the many issues involved in assisted living, including the care of special populations, the development of appropriate patient assessment instruments, regulations, and other matters.



Importantly, only an adult home can become an assisted living facility, and only an assisted living facility can become an enhanced assisted living facility or apply for a special needs permit to serve special dementia or cognitive impairment populations.

JUSTIFICATION: As people get older and less able to live on their own, other living arrangements must be considered. Assisted living is one choice that has been extremely popular in most states in the country (as of 1999, there were an estimated 25,377 senior housing properties with assisted living services in the U.S.)-but this kind of facility has not been available in New York. The reason for its popularity is clear: assisted living helps residents be as independent as possible while giving assistance when needed. The arrangement of a room or small apartment and meals, along with personal care and support services, social activities, 24-hour supervision and some health-related services, is good for people who can't live on their own but who don't need a nursing home. Older people have many different needs. Those needs often change over time, so assisted living offers different levels of care at different costs. This measure provides the authorization and the consumer protection required to develop high-quality assisted living in New York.

LEGISLATIVE HISTORY: New bill

FISCAL IMPLICATIONS: It is anticipated that the provision of this new level of service should save the state money.

EFFECTIVE DATE: 120 days after it becomes law.

Title 9 Executive Law

**OFFICIAL COMPILATION OF CODES, RULES AND
REGULATIONS OF THE STATE OF NEW YORK
TITLE 9. EXECUTIVE DEPARTMENT
SUBTITLE Y. NEW YORK STATE OFFICE FOR THE AGING
CHAPTER IV. LONG TERM CARE OMBUDSMAN PROGRAM
PART 6660. LONG TERM CARE OMBUDSMAN**

SECTION 6660.5 RESPONSIBILITIES OF A LONG TERM CARE OMBUDSMAN.

(a) A long term care ombudsman receives, investigates and resolves complaints relating to administrative action which may adversely affect the health, safety, welfare and rights of residents of long term care facilities made by or on behalf of older individuals who are residents of long term care facilities.

(b) A long term care ombudsman who is not an employee of the State Office for the Aging serves in a facility or facilities as designated by his or her supervisor, and acts as a long term care ombudsman only within the program service area of designated substate long term care ombudsman program unless directed otherwise by his or her supervisor.

(c) A long term care ombudsman program immediately refers to the appropriate investigatory agency information obtained during the investigation of a complaint which suggests the possible occurrence of physical abuse, mistreatment or neglect or Medicaid fraud, in accordance with procedures established by the State long term care ombudsman. Such procedures shall include but not be limited to the reporting to the appropriate investigatory agency any information which suggests the possible occurrence of physical abuse, mistreatment or neglect as defined in section 2803 d of the Public Health Law, as amended by chapter 340 of the Laws of 1980 and as may be subsequently amended, which would be required of any employee of a residential health care facility, and without regard to whether such law would apply to the long term care facility which the resident resides.

SECTION 6660.8 RESPONSIBILITIES OF SUPERVISORS.

Each substate long term care ombudsman program shall be directed by a paid supervisor who has supervisory authority over the long term care ombudsmen participating in such substate program, including responsibility for:

- (a) recruiting, screening, training and supervising such ombudsmen;
- (b) identifying those to be recommended to the State long term care ombudsman for designation as long term care ombudsmen or records access ombudsmen;
- (c) identifying to the State long term care ombudsman those whose certification as long term care ombudsmen is recommended to be removed;
- (d) distributing to the long term care ombudsmen identification cards, and collecting such cards from those leaving or being removed from the program;
- (e) assigning long term care ombudsmen to facilities in the program's service area in accordance with standards set by the State long term care ombudsman; and
- (f) assuring that any files maintained by the ombudsman program are disclosed only at the discretion of the State long term care ombudsman, and that the identity of any complainant or resident of a long term care facility shall not be disclosed unless:
 - (1) such complainant or resident, or his court appointed committee, consents in writing to such disclosure; or
 - (2) such disclosure is required by court order. Nothing in this Part shall restrict referral by any complaint made by or on behalf of a resident or applicant for admission to a long term care facility to a statutorily established certifying, investigatory or licensure agency.





SECTION 6660.12 PROCEDURES FOR OMBUDSMAN ACCESS.

(a).

(1) For the purposes of this section, the personal or medical records of a patient or resident means those records maintained by a long term care facility as required by law, defined in 10 NYCRR sections 415.4(c) and 420.4(c) of the regulations of the Department of Health or 18 NYCRR section 487.10(c)(4)(ii) of the regulations of the Department of Social Services.

(2) For the purposes of this section, access to personal or medical records means the right to review, upon request to the facility staff designated by the administrator under paragraph m of subdivision 3 of section 2803 c of the Public Health Law or subdivision 4 of section 461 a of the Social Services Law to provide access to and, where necessary, interpretation of such records to records access ombudsmen, for such ombudsman's examination and, if desired by and paid for by such ombudsman, photocopying. Access shall not include the power to review the personal notes to the physician as defined in regulations of the Department of Health, 10 NYCRR section 411.1(c).

(b) An ombudsman seeking access to a resident of a long term care facility shall identify himself or herself to a staff member of the facility; shall show, upon such staff member's request, the ombudsman identification card issued by the State Office for the Aging; shall comply with the facility's procedures for signing in and out of the facility; shall identify himself or herself to the satisfaction of the resident; and shall in all interactions with the resident comply with the procedures of the long term care ombudsman program for respecting resident rights to privacy, confidentiality and freedom of association.

(c) A records access ombudsman shall not seek access to a patient's or resident's personal or medical records except for the purpose of investigating a complaint made by or on behalf of one or more patients or residents.

(d) Prior to seeking access to medical or personal records of a patient or resident, a records access ombudsman must obtain the express written approval for access to those personal or medical records of such records access ombudsman's supervisor, showing the signature of the supervisor of the records access ombudsman.

(e) The records access ombudsman shall not remove the original record from the premises of the facility providing care to the patient or resident. Any copies removed from the premises by the ombudsman are subject to the confidentiality provisions of this section.

(f) A records access or other ombudsman shall not disclose to any person outside of the ombudsman program any information obtained from a patient's or resident's personal or medical records without the express written consent of the patient or resident, or, where applicable, the patient's or resident's courtappointed committee, except pursuant to court order or through referral of information contained in the record to any agency which licenses, investigates or regulates the facility in which the patient or resident resides or has resided.

(g) Even with express written consent for disclosure, a records access or other ombudsman shall not disclose to any person outside of the ombudsman program any information obtained from a patient's or resident's personal or medical records to which such person would not otherwise have had the right of access to that information, except pursuant to court order and provided that this restriction shall not prevent such ombudsman from advising such patient or resident of the status or progress of an investigation or complaint process or from referring such complaint to any agency which licenses, investigates or regulates the facility in which the patient or resident resides or has resided.

(h) An ombudsman who intentionally violates the confidentiality of personal or medical records may be prosecuted for a misdemeanor under subdivi

Title 10 Department of Health

OFFICIAL COMPILATION OF CODES, RULES AND REGULATIONS OF THE STATE OF NEW YORK

TITLE 10. DEPARTMENT OF HEALTH

CHAPTER V. MEDICAL FACILITIES

SUBCHAPTER A. MEDICAL FACILITIES MINIMUM STANDARDS

ARTICLE 1. GENERAL

PART 400. ALL FACILITIES—GENERAL REQUIREMENTS

SECTION 400.21 ADVANCE DIRECTIVES

(a) Statement of purpose. Recent advances in medical technology have brought forth a multitude of choices about medical treatment. Advances in emergency medical services have expanded the capacity of the health care system to save the lives of victims who previously would not have survived acute trauma. New drugs and new surgical techniques may prolong life, but may not necessarily halt the spread of progressive or degenerative illness. Life support systems can maintain unconscious patients for months or even years.

Decisions about medical treatment based on the availability of this burgeoning medical technology are deeply personal. They reflect basic values, personality traits and religious attitudes. An adult's capacity to tolerate pain, disfigurement or dependency must be considered.

The New York State Health Care Proxy Law allows an adult to designate another adult, such as a trusted friend or loved one who knows the person and his/her wishes, to make these treatment decisions if the adult becomes incapacitated and is unable to do so. The Health Care Proxy Law guarantees an adult's right to self-determination and the expression of this right through another adult.

Advance directives like the Health Care Proxy also allow an adult to express his or her preference regarding health care treatment, including a desire to continue or to refuse treatment and life supports.

In the absence of a Health Care Proxy, adults who express their wishes orally or in writing concerning life-sustaining treatment in a clear and convincing manner are entitled, based on decisions of both the United States Supreme Court and the New York State Court of Appeals, to have those wishes recognized.

Facilities must ensure that all adult patients/residents are informed of their rights and are supported and protected as they exercise their right to formulate written or oral instructions regarding their health care in the event such adults become incapacitated and are unable to direct their own health care.

(b) Definitions. The following words or phrases shall have the following meanings:

- (1) An advance directive means a type of written or oral instruction relating to the provision of health care when an adult becomes incapacitated, including, but not limited to a health care proxy, a consent pursuant to Article 29-B of the Public Health Law to the issuance of an order not to resuscitate recorded in a patient's/resident's medical record, and a living will;
- (2) A health care proxy means a document created pursuant to Article 29-C of the Public Health Law which delegates the authority to another adult known as a health care agent to make health care decisions on behalf of the adult when that adult is incapacitated.
- (3) A living will means a document which contains specific instructions concerning an adult's wishes about the type of health care choices and treatments that an adult does or does not want to receive, but which does not designate an agent to make health care decisions;
- (4) A health care agent or agent means an adult to whom authority to make health care decisions is delegated under a health care proxy; and
- (5) An adult means any person who is 18 years of age or older, or is the parent of a child, or has married.

(c) Facility compliance. The facility shall ensure compliance with the requirements of law governing advance directives including but not limited to Articles 29-B and 29-C of the Public Health Law.





(d) Policies and procedures. The facility shall be responsible for developing, implementing and maintaining written policies and procedures addressing advance directives and shall:

- (1) furnish the following material to each adult patient/resident, or if the adult patient/resident lacks capacity, to the family member or other adult who speaks on the patient's/resident's behalf at or prior to the time of admission to the facility as an inpatient or an outpatient and to each member of the facility's staff who provides patient/resident care. A facility need not provide these items more than once to an outpatient receiving services on a recurring basis:
 - (i) the description of state law prepared by the Department entitled "Planning in Advance for your Medical Treatment," which summarizes the rights, duties and requirements of Articles 29-B and 29-C and the right of an adult to formulate advance directives as expressed in final decisions of courts of competent jurisdiction;
 - (ii) the pamphlet prepared by the Department entitled "Appointing your Health Care Agent - New York State's Proxy Law," containing a sample health care proxy form; and
 - (iii) a summary of the facility's policy regarding the implementation of these rights.
- (2) ensure that there is documentation in each adult's medical record indicating whether or not the adult has executed a health care proxy under Article 29-C of the Public Health Law, or whether the adult has provided written or oral advance instructions about treatment to facility staff responsible for the patient's care or to facility employees upon admission;
- (3) assess advance directives other than those described in Articles 29-B and 29-C of the Public Health Law. Nothing herein shall be construed to require that a facility must or may not seek a court determination that any individual advance directive has been expressed in a clear and convincing manner;
- (4) provide in-service education to staff involved in the provision of care including medical staff concerning the facility's policies and procedures concerned with advance directives;
- (5) provide (individually or with others) education to the community on issues concerning advance directives;
- (6) ensure that an adult is not discriminated against in the provision of care or otherwise discriminated against based on whether or not the adult has executed an advance directive; and
- (7) in addition, a nursing home shall:
 - (i) educate adult residents about the authority delegated under a health care proxy, what a proxy may include or omit, and how a proxy is created, revoked, or changed as requested by the resident;
 - (ii) ensure that each resident who creates a proxy while residing at the facility does so voluntarily; and
 - (iii) designate one or more individuals to educate the residents, respond to questions and assist residents in creating, revoking or changing a proxy.

(e) Rights to be publicized. The facility shall post in a public place in the facility the rights, duties and requirements of this section. Such statement may be included in any other statement of patient's/resident's rights required to be posted.

**OFFICIAL COMPILATION OF CODES, RULES AND
REGULATIONS OF THE STATE OF NEW YORK
TITLE 10. DEPARTMENT OF HEALTH
CHAPTER V. MEDICAL FACILITIES
SUBCHAPTER A. MEDICAL FACILITIES MINIMUM STANDARDS
ARTICLE 3. RESIDENTIAL CARE FACILITIES
PART 410. SCHEDULED SHORT TERM CARE IN A NURSING
HOME**

SECTION 410.1 DEFINITIONS

(a) Scheduled short term care in a nursing home shall mean scheduled short term nursing home care provided on a temporary basis to an individual who needs this level of care but who is normally cared for in the community. The goal of scheduled short term care is to provide relief for the caregiver(s) while providing nursing home care for the individual. Schedules for scheduled short term care are generally pre-arranged and shall be limited to one or more periods of from one to 30 days and shall not exceed 42 days in any one year except in extraordinary circumstances, such as sudden illness of the primary caregiver or temporary unfitness of the individual's principal residence.

(b) A caregiver shall mean a family member or other person who routinely provides the daily care or supervision of the individual in the home.

SECTION 410.2 RESIDENT CARE STANDARDS.

(a) Services provided to scheduled short term residents shall comply with the regulations governing nursing homes in Parts 400, 411, 412, 413, 414 and 415 of this Subchapter, as appropriate, except for the following provisions: 400.11, Assessment of long term care patients; 400.13 Forms (Hospital /Community Patient Review Instrument) 415.3(c)(2)(ii)(a)(1) (3), (b) and (c), Protection of Legal Rights; 415.3(h)(1)(i) (vi), (2)(i) (v) and (3), W(i) (iii), Transfer and Discharge Rights; 415.11(d)(1) (3), Discharge Summary; 415.17(b) and (c), Dental Services; 415.26(b)(10)(ii)(a) and (b) Governing Body; and 415.26(i)(1)(i)(a) (c), (iii) and (v), Admission Policies and Practices.

(b) All facility staff involved with the scheduled short term care residents shall receive a general orientation to familiarize them with these services. Direct care staff shall receive training to include an overview of scheduled short term care, the special needs of the elderly living at home, and how facility care practices can be adapted to reflect patterns of care provided by the caregiver.

(c) Scheduled short term care services shall be provided in a manner that meets the needs of the resident and shall not interfere with, or detract from, the ongoing services provided to the other residents of the facility.

(d) If the potential resident is not already known to the facility through such means as a prior admission for scheduled short term services or enrollment in the facility's adult day health care services or long term home health care program, the facility shall arrange for facility staff to visit the prospective resident and caregiver at their home or shall arrange for the prospective resident and caregiver to visit the facility to determine whether scheduled short term care in a nursing home is appropriate for the individual.

(e) An assessment of each new applicant shall be completed prior to admission in order to establish baseline information about the individual and to establish a plan of care which meets his or her needs for nursing home services.

(f) A history and physical examination shall be completed for each potential scheduled short term care resident before admission unless: one has been completed within the past year, the results of which are available to the facility, and the resident's condition has remained unchanged.

(g) The nursing home shall admit residents for scheduled short term care only on a physician's order.

(h) A resident care plan based on the assessment and history and physical examination shall be developed with the resident and caregiver and completed upon admission. Following admission, the resident care plan shall be revised as necessary to reflect any change in the resident's care needs.

(i) Prior to admission, a discharge plan shall be developed with the prospective resident and caregiver. The discharge plan shall provide for return to the resident's home setting. Prior to, discharge of the resident, the discharge plan shall be discussed with the caregiver to note any changes in the resident's condition and to discuss any recommendation for provision of care and services after the resident's return to the home setting.





- (j) Following discharge, the facility shall contact the former resident and caregiver to obtain their assessment of the scheduled short term care experience. No less frequently than every six months, the nursing home shall evaluate the findings of these assessments. Based on this evaluation, written policies and procedures and facility practices shall be changed or modified as needed.

**OFFICIAL COMPILATION OF CODES, RULES AND
REGULATIONS OF THE STATE OF NEW YORK
TITLE 10. DEPARTMENT OF HEALTH
CHAPTER V. MEDICAL FACILITIES
SUBCHAPTER A. MEDICAL FACILITIES MINIMUM STANDARDS
ARTICLE 3. RESIDENTIAL CARE FACILITIES
PART 411. OMBUDSMEN ACCESS TO RESIDENTIAL HEALTH
CARE FACILITIES**

SECTION 411.1 DUTY OF THE OPERATOR.

The operator shall:

- (a) ensure that, ombudsmen who are duly certified and designated by the State Of Office for the Aging shall have access to a residential health care facility without restriction, and shall prohibit interference with ombudsmen when they are performing their official duties and retaliation or reprisal against any resident, employee or other person, who has filed a complaint with, or provided information to, such ombudsmen;
- (b) ensure privacy and confidentiality in such visits with the patients by duly authorized ombudsmen; and
- (c) ensure that records access ombudsmen specially designated under section 544 of the State Executive Law shall have access to medical and personal records, subject to the following provisions and exceptions:
 - (1) the patient/resident, or, where appropriate, the patient's/resident's appointed committee, shall provide express written consent;
 - (2) periods of access shall include normal business hours, and may include other times mutually acceptable to the ombudsmen and the facility by appointment;
 - (3) one or more members of the facility's staff shall be available to arrange for inspection, and, for a reasonable fee, to photocopy such records; and
 - (4) a physician's personal notes, which shall mean the physician's speculations, reminders, impressions other than diagnostic impressions, and other information unrelated to treatment decisions, may be excluded from disclosure;
- (d) ensure that residents, employees or other person(s) may file complaints with or provide information to any long term care patient ombudsman as specified in section 411.1(a) of this Part.





**OFFICIAL COMPILATION OF CODES, RULES AND
REGULATIONS OF THE STATE OF NEW YORK
TITLE 10. DEPARTMENT OF HEALTH
CHAPTER V. MEDICAL FACILITIES
SUBCHAPTER A. MEDICAL FACILITIES—MINIMUM STANDARDS
ARTICLE 3. RESIDENTIAL CARE FACILITIES
PART 415. NURSING HOMES—MINIMUM STANDARDS
RESIDENTIAL RIGHTS AND SERVICES**

SECTION 415.3 RESIDENTS' RIGHTS.

(a) The facility shall ensure that all residents are afforded their right to a dignified existence, self-determination, respect, full recognition of their individuality, consideration and privacy in treatment and care for personal needs and communication with and access to persons and services inside and outside the facility. The facility shall protect and promote the rights of each resident, and shall encourage and assist each resident in the fullest possible exercise of these rights as set forth in subdivisions (b) - (h) of this section. The facility shall also consult with residents in establishing and implementing facility policies regarding residents' rights and responsibilities.

- (1) The facility shall advise each member of the staff of his or her responsibility to understand, protect and promote the rights of each resident as enumerated in this section.
- (2) The facility shall fully inform the resident and the resident's designated representative both orally and in writing in a method of communication that the individuals understand the resident's rights and all rules and regulations governing resident conduct and responsibilities during the stay in the facility. Such notification shall be made prior to or upon admission and during the resident's stay. Receipt of such information, and any amendments to it, shall be acknowledged in writing. A summary of such information shall be provided by the Department and posted in the facility in large print and in language that is easily understood.
- (3) The written information provided pursuant to paragraph (2) of this subdivision shall include but not be limited to a listing of those resident rights and facility responsibilities enumerated in subdivisions (b) through (h) of this section. The facility's policies and procedures shall also be provided to the resident and the resident's designated representative upon request.
- (4) The facility shall communicate to the resident an explanation of his or her responsibility to obey all reasonable regulations of the facility and to respect the personal rights and private property of other residents.
- (5) Any written information required by this Part to be posted shall be posted conspicuously in a public place in the facility that is frequented by residents and visitors, posted at wheelchair height.

(b) Admission rights. The nursing home shall protect and promote the rights of residents and potential residents by establishing and implementing policies which ensure that the facility:

- (1) shall not require a third party guarantee of payment to the facility as a condition of admission, or expedited admission, or continued stay in the facility;
- (2) shall not charge, solicit, accept or receive, in addition to any amount otherwise required to be paid by third party payors, any gift, money, donation or other consideration as a precondition of admission, expedited admission or continued stay in the facility except that arrangements for prepayment for basic services not exceeding three months shall not be precluded by this paragraph;
- (3) shall not require residents or potential residents to waive their rights to Medicare or Medicaid benefits;
- (4) shall not require oral or written assurance that residents or potential residents are not eligible for, or will not apply for, Medicare or Medicaid benefits;
- (5) shall obey all pertinent state and local laws which prohibit discrimination against individuals entitled to Medicaid benefits;
- (6) may require an individual who has legal access to a resident's income or resources available to pay for facility care, to sign a contract, without incurring personal financial liability, to provide the facility payment from the resident's income or resources;
- (7) may charge a resident who is eligible for Medicaid for items and services the resident has requested and received, and that are not specified at the time of admission as included in basic nursing home services, so long as the facility gives proper notice of the availability and cost of these items and services to the resident and does not condition the resident's admission or continued stay on the request for and receipt of such additional items and services; and



- (8) may solicit, accept or receive a charitable, religious or philanthropic contribution from an organization or from a person unrelated to the resident, or potential resident, only to the extent that the contribution is not a condition of admission, expedited admission, or continued stay in the facility.
- (c) Protection of Legal Rights.
- (1) Each resident shall have the right to:
- (i) exercise his or her rights as a resident of the facility and as a citizen or resident of the United States and New York State including the right to vote, with access arranged by the facility and to this end may voice grievances without discrimination or reprisal for voicing the grievances, and have a right of action for damages or other relief for deprivations or infringements of his or her right to adequate and proper treatment and care established by any applicable statute, rule, regulation or contract;
 - (ii) recommend changes in policies and services to facility staff and/or to any outside representatives, free of interference, coercion, discrimination, restraint or reprisal from the facility and to obtain prompt efforts by the facility to resolve grievances the resident may have, including those with respect to the behavior of other residents;
 - (iii) exercise his or her individual rights or have his or her rights exercised by a person authorized by state law;
 - (iv) inspect all records including clinical records pertaining to himself or herself within 24 hours after an oral or written request to the facility and, after receipt of such records for inspection, to purchase at a cost which is the lower of the cost incurred by the facility in production of the record or 75 cents per page, photocopies of the records or any portions of them upon request and two working days advance notice to the facility. The designated representative who has authority to make health care decisions for the resident shall likewise have access to the resident's records in accordance with this subparagraph, State law and the rights of a competent resident to deny such access. A resident or such designated representative shall not be denied access to the clinical records solely because of inability to pay.
 - (v) examine the results of the most recent survey of the facility conducted by federal or State surveyors including any statement of deficiencies, any plan of correction in effect with respect to the facility and any enforcement actions taken by the Department of Health. The results shall also be made available by the facility for examination. They shall be made available in a place readily accessible to residents and designated representatives without staffing assistance;
 - (vi) receive information from agencies acting as resident advocates, and be afforded the opportunity to contact these agencies;
 - (vii) be free from verbal, sexual, mental or physical abuse, corporal punishment and involuntary seclusion, and free from chemical and physical restraints except those restraints authorized in accordance with section 415.4 of this Part;
 - (viii) exercise his or her civil and religious liberties, including the right to independent personal decisions and knowledge of available choices, which shall not be infringed; and
 - (ix) request, or have the resident's designated representative request, and be provided information concerning his or her specific assignment to a patient classification category as contained in Appendix 13-A of this Title, entitled, "Patient Categories and Case Mix Indices Under Resource Utilization Group (RUG-II) Classification System."
- (2) With respect to its responsibilities to the resident the facility shall:
- (i) furnish a written description of legal rights which includes:
 - (a) a description of the manner of protecting personal funds, under subdivision (h) of section 415.26 of this Part; and
 - (b) a statement that the resident may file a complaint with the facility or the New York State Department of Health concerning resident abuse, neglect, mistreatment and misappropriation of resident property in the facility. The statement shall include the name, address and telephone number of the office established by the Department to receive complaints and of the State Office for the Aging Ombudsmen Program;
 - (ii) promptly notify the resident and the resident's designated representative when there is:
 - (a) a change in room. Except when the medical condition of the resident requires an immediate room change or an emergency situation has developed, such change in room shall require prior notice and consultation with the resident as well as reasonable accommodation of any resident needs or preferences;
 - (b) a change in roommate assignment which shall be acceptable, where possible, to all affected residents; or
 - (c) a change in resident rights under Federal or State law or regulations as specified in this section;
 - (iii) record and periodically update the address and phone number of the resident's designated representative;
 - (iv) provide immediate access to any resident by the following:
 - (a) any representative of the Secretary of Health and Human Services;
 - (b) any representative of the Department of Health;
 - (c) the resident's responsible physician;
 - (d) ombudsmen who are duly certified and designated by the State Office for the Aging;



- (e) representatives of the Commission on Quality of Care for the Mentally Disabled which is responsible for the protection and advocacy system for developmentally disabled individuals and mentally ill individuals; (f) immediate family or other relatives of the resident, subject to the resident's right to deny or withdraw consent at any time, and
 - (g) others who are visiting with the consent of the resident, subject to reasonable restrictions and the resident's right to deny or withdraw consent at any time;
 - (v) post the names, addresses and telephone numbers of all pertinent state client advocacy groups and provide reasonable access to any resident by any entity or individual that provides health, social, legal or other services to the resident, subject to the resident's right to deny or withdraw consent at any time;
 - (vi) comply with the provisions of Part 411 of this Title regarding Ombudsmen Access to Residential Health Care Facilities; and
 - (vii) inform residents of the facility's visiting hour policies.
- (d) Right to Privacy. Each resident shall have the right to:
- (1) personal privacy and confidentiality of his or her personal and clinical records which shall reflect:
 - (i) accommodations, medical treatment, written and telephone communications, personal care, associations and communications with persons of his or her choice, visits, and meetings of family and resident groups. Resident and family groups shall be provided with private meeting space and residents shall be given access to a private area for visits or solitude. Such requirement shall not require the facility to provide a private room for each resident; and
 - (ii) the resident's right to approve or refuse the release of personal and clinical records to any individual outside the facility except when:
 - (a) the resident is transferred to another health care institution; or
 - (b) record release is required by law;
 - (2) privacy in written communications, including the right to:
 - (i) send and receive mail promptly that is unopened; and
 - (ii) have access to stationery, postage and writing implements at the resident's own expense; and
 - (3) regular access to the private use of a telephone that is wheelchair accessible and usable by hearing impaired and visually impaired residents.
- (e) Right to Clinical Care and Treatment.
- (1) Each resident shall have the right to:
 - (i) adequate and appropriate medical care, and to be fully informed by a physician in a language or in a form that the resident can understand, using an interpreter when necessary, of his or her total health status, including but not limited to, his or her medical condition including diagnosis, prognosis and treatment plan. Residents shall have the right to ask questions and have them answered;
 - (ii) refuse to participate in experimental research and to refuse medication and treatment after being fully informed and understanding the probable consequences of such actions;
 - (iii) choose a personal attending physician from among those who agree to abide by all federal and state regulations and who are permitted to practice in the facility;
 - (iv) be fully informed in advance about care and treatment and of any changes in that care or treatment that may affect the resident's well-being;
 - (v) participate in planning care and treatment or changes in care and treatment. Residents adjudged incompetent or otherwise found to be incapacitated under the laws of the State of New York shall have such rights exercised by a designated representative who will act in their behalf in accordance with State law; and
 - (vi) self-administer drugs if the interdisciplinary team, as defined by Section 415.11, has determined for each resident that this practice is safe.
 - (2) With respect to its responsibilities to the resident, the facility shall:
 - (i) inform each resident of the name, office address, phone number and specialty of the physician responsible for his or her own care.
 - (ii) except in a medical emergency, consult with the resident immediately if the resident is competent, and notify the resident's physician and designated representative within 24 hours when there is:
 - (a) an accident involving the resident which results in injury requiring professional intervention;
 - (b) a significant improvement or decline in the resident's physical, mental, or psychosocial status in accordance with generally accepted standards of care and services;
 - (c) a need to alter treatment significantly; or
 - (d) a decision to transfer or discharge the resident from the facility as specified in subdivision (h) of this section;
- and

(iii) provide all information a resident or the resident's designated representative when permitted by State law, may need to give informed consent for an order not to resuscitate and comply with the provisions of section 405.43 of this Subchapter regarding orders not to resuscitate. Upon resident request the facility shall furnish a copy of the pamphlet, "Do Not Resuscitate Orders - A Guide for Patients and Families".

(f) Residential Rights. Each resident shall have the right to:

- (1) refuse to perform services for the facility. The resident may perform such services, if he or she chooses, only when:
 - (i) there is work available in the facility that the resident is capable of safely performing;
 - (ii) the facility has documented the need or desire for work in the plan of care;
 - (iii) the plan specifies the nature of the services performed and whether the services are voluntary or paid;
 - (iv) compensation for paid services is at or above prevailing rates; and
 - (v) the resident agrees to the work arrangement described in the plan of care;
- (2) retain, store securely and use personal possessions, including some furnishings, and appropriate clothing, as space permits, unless to do so would infringe upon the rights or health and safety of the resident or other residents in which case the facility shall explore alternatives through discussion with the resident, the resident council or interdisciplinary care team, and provide or assist in the arrangement of storage for possessions. The resident shall have the right to locked storage space in his or her room;
- (3) share a room with his or her spouse, relative or partner when these residents live in the same facility and both consent to the arrangement. If a spouse, relative or partner resides in a location out of the facility, the resident shall be assured of privacy for visits;
- (4) participate in the established residents' council;
- (5) meet with, and participate in activities of social, religious and community groups at his or her discretion; and
- (6) receive, upon request, kosher food or food products prepared in accordance with the Hebrew orthodox religious requirements when the resident, as a matter of religious belief, desires to observe Jewish dietary laws.

(g) Financial Rights.

- (1) Each resident shall have the right to manage his or her financial affairs or authorize in writing the facility to manage personal finances in accordance with paragraph (5) of subdivision (h) of section 415.26 of this Part. The facility may not require residents to deposit their personal funds with the facility;
- (2) With respect to its responsibilities to the resident, the facility shall:
 - (i) inform each resident who is entitled to Medicaid benefits, in writing, at the time of admission to the nursing home or, when the resident becomes eligible for Medicaid of:
 - (a) the items and services that are included in nursing home services under the State plan and for which the resident may not be charged;
 - (b) those other items and services that the facility offers and for which the resident may be charged, and the amount of charges for those services; and
 - (c) the clear distinction between the two lists required by clauses (a) and (b) of this subparagraph;
 - (ii) inform each resident when changes are made to the items and services specified in clauses (a) and (b) of subparagraph (i) of this paragraph;
 - (iii) inform each resident verbally and in writing before, or at the time of admission, and periodically when changes occur during the resident's stay, of services available in the facility and of charges for those services, including any charges for services not covered by sources of third party payment or by the facility's basic per diem rate; and
 - (iv) prominently display in the facility written information, and provide to residents and potential residents oral and written information about how to apply for and use Medicare and Medicaid benefits, and how to receive refunds for previous payments covered by such benefits as well as a description of the requirements and procedures for establishing eligibility for Medicaid, including the right to request an assessment which will determine the extent of a couple's non-exempt resources at the time of institutionalization and attribute to the community spouse an equitable share of resources which cannot be considered available for payment toward the cost of the institutionalized spouse's medical care in his or her process of spending down to Medicaid eligibility levels.

(h) Transfer and discharge rights. Transfer and discharge shall include movement of a resident to a bed outside of the certified facility whether that bed is in the same physical plant or not. Transfer and discharge shall not refer to movement of a resident to a bed within the same certified facility.

(1) With regard to the transfer or discharge of residents, the facility shall:

- (i) permit each resident to remain in the facility, and not transfer or discharge the resident from the facility unless such transfer or discharge is made in recognition of the resident's rights to receive considerate and respectful care, to receive necessary care and services, and to participate in the development of the comprehensive care plan and in recognition of the rights of other residents in the facility.





- (a) The resident may be transferred only when the interdisciplinary care team, in consultation with the resident or the resident's designated representative, determines that:
- (1) the transfer or discharge is necessary for the resident's welfare and the resident's needs cannot be met after reasonable attempts at accommodation in the facility;
 - (2) the transfer or discharge is appropriate because the resident's health has improved sufficiently so the resident no longer needs the services provided by the facility; or
 - (3) the health or safety of individuals in the facility would otherwise be endangered, the risk to others is more than theoretical and all reasonable alternatives to transfer or discharge have been explored and have failed to safely address the problem.
- (b) Transfer and discharge shall also be permissible when the resident has failed, after reasonable and appropriate notice, to pay for (or to have paid under Medicare, Medicaid or third party insurance) a stay at the facility. For a resident who becomes eligible for Medicaid after admission to a facility the facility may charge a resident only allowable charges under Medicaid. Such transfer or discharge shall be permissible only if a charge is not in dispute, no appeal of a denial of benefits is pending, or funds for payment are actually available and the resident refuses to cooperate with the facility in obtaining the funds.
- (c) Transfer or discharge shall also be permissible when the facility discontinues operation and has received approval of its plan of closure in accordance with subdivision (i) of Section 401.3 of this Subchapter.
- (ii) ensure complete documentation in the resident's clinical record when the facility transfers or discharges a resident under any of the circumstances specified in subparagraph (i) of this paragraph. The documentation shall be made by:
- (a) the resident's physician and interdisciplinary care team, as appropriate, when transfer or discharge is necessary under subclause (1) or (2) of clause (a) of subparagraph (i) of this paragraph; and
 - (b) a physician when transfer or discharge is necessary due to the endangerment of the health of other individuals in the facility under subclause (3) of clause (a) of subparagraph (i) of this paragraph;
- (iii) before it transfers or discharges a resident:
- (a) notify the resident and designated representative of the transfer or discharge and the reasons for the move in writing and in a language and manner they understand;
 - (b) record the reasons in the resident's clinical record; and
 - (c) include in the notice the items described in subparagraph (v) of this paragraph;
- (iv) provide the notice of transfer or discharge required under subparagraph (iii) of this paragraph at least 30 days before the resident is transferred or discharged, except that notice shall be given as soon as practicable before transfer or discharge under the following circumstances:
- (a) the safety of individuals in the facility would be endangered;
 - (b) the health of individuals in the facility would be endangered;
 - (c) the resident's health improves sufficiently to allow a more immediate transfer or discharge;
 - (d) an immediate transfer or discharge is required by the resident's urgent medical needs; or
 - (e) the transfer or discharge is being made in compliance with a request by the resident.
- (v) include in the written notice specified in subparagraph (iii) of this paragraph the following:
- (a) for transfers or discharges a statement that the resident has the right to appeal the action to the State Department of Health in accordance with paragraphs (2) and (3) of this subdivision. The statement shall include a current phone number for the Department which can be used to initiate an appeal;
 - (b) the name, address and telephone number of the State long term care ombudsman;
 - (c) for nursing facility residents who are mentally ill or who have developmental disabilities, the mailing address and telephone number of the Commission on Quality of Care for the Mentally Disabled which is responsible for the protection and advocacy of such individuals; and
 - (d) a statement that, if the resident appeals the transfer or discharge to the Department of Health within 15 days of being notified of such transfer or discharge, the resident may remain in the facility pending an appeal determination. This clause shall not apply to transfers or discharges based on clauses (a), (b), (d) or (e) of subparagraph (iv) of this paragraph; and (vi) provide sufficient preparation and orientation to residents to ensure safe and orderly transfer or discharge from the facility including an opportunity to participate in deciding where to go.
- (2) Appeals of transfer and discharge decisions to the Department of Health as permitted by clause (a) of subparagraph (v) of paragraph (1) of this subdivision shall be in accordance with the following:
- (i) the resident has the right to:
 - (a) a pre-transfer on-site appeal determination under the auspices of the Department of Health, provided that the resident has appealed the transfer or discharge within 15 days of the notice, except in cases involving imminent danger to others in the facility, and
 - (b) remain in the facility pending an appeal determination, or



(c) a post-transfer appeal determination within 30 days of transfer if the resident did not request an appeal determination prior to transfer, or

(d) return to the facility to the first available bed if the resident wins the appeal; and

(e) examine his/her medical records.

(ii) the presiding officer shall have the power to obtain medical and psychosocial consultations,

(iii) the nursing home shall have the burden of proof that the transfer is/was necessary and the discharge plan appropriate,

(iv) in cases involving imminent danger to others in the facility, an involuntary transfer may be arranged before a hearing. However, the facility shall be required to hold the resident's bed until after the hearing decision. If the transfer is found to be appropriate, the facility may charge a private pay resident for the time the bed was held. If the transfer is found to be inappropriate, the facility shall readmit the resident to his or her bed on a priority basis,

(v) the department shall conduct a review and render a decision on the appeal as required in clause (a) of subparagraph (i) of this paragraph within 15 days of the request.

(3) If an appeal decision rendered after discharge finds the discharge or transfer to be inappropriate, the facility shall readmit the resident prior to admitting any other person.

(4) The facility shall establish and implement a bed-hold policy and a readmission policy that reflect at least the following:

(i) At the time of admission and again at the time of transfer for any reason, the facility shall verbally inform and provide written information to the resident and the designated representative that specifies:

(a) the duration of the bed-hold policy during which the resident is permitted to return and resume residence in the facility; and

(b) the facility's policies regarding bed-hold periods, which must be consistent with subparagraph (iii) of this paragraph, permitting a resident to return.

(ii) At the time for therapeutic leave, a nursing home shall provide written notice to the resident and the designated representative, which specifies the duration of the bed-hold policy described in subparagraph (i) of this paragraph.

(iii) A nursing home shall establish and follow a written policy under which a resident whose hospitalization or therapeutic leave exceeds the bed hold period is readmitted to the facility immediately upon the first availability of a bed in a semi-private room if the resident:

(a) requires the services provided by the facility; and

(b) is eligible for Medicaid nursing home services.

(iv) A nursing home shall establish and follow a written policy under which a resident who has resided in the nursing home for 30 days or more and who has been hospitalized or who has been transferred or discharged on therapeutic leave without being given a bed-hold is readmitted to the facility immediately upon the first availability of a bed in a semi-private room if the resident:

(a) requires the services provided by the facility; and

(b) is eligible for Medicaid nursing home services.

(5) With regard to the assurance of equal access to quality care, the facility shall establish and maintain identical policies and practices regarding transfer, discharge and the provision of all required services for all individuals regardless of source of payment.

SECTION 415.4 RESIDENT BEHAVIOR AND FACILITY PRACTICES

The facility shall provide each resident with considerate and respectful care designed to promote the resident's independence and dignity in the least restrictive environment commensurate with the resident's preference and physical and mental status.

(a) Physical and Chemical Restraints. The facility and all medical, nursing, and other professional staff shall assure that:

(1) the resident is free, consistent with subdivision (l) of section 415.12 of this Part, from any psychotropic drug administered for purposes of discipline or convenience, and not required to treat the resident's medical conditions or symptoms; and

(2) physical restraints, any manual method or physical or mechanical device, material or equipment attached or adjacent to the resident's body that the individual cannot remove easily which restricts freedom of movement or normal access to one's body, are:

(i) used only to protect the health and safety of the resident and to assist the resident to attain and maintain optimum levels of physical and emotional functioning;

(ii) an integral part of the interdisciplinary care plan that is individualized as to the type of restraint, release schedules, type of exercise, necessary skin care and ambulation to be provided, and is intended to lead to less restrictive treatment to manage the problem for which the restraint is applied;



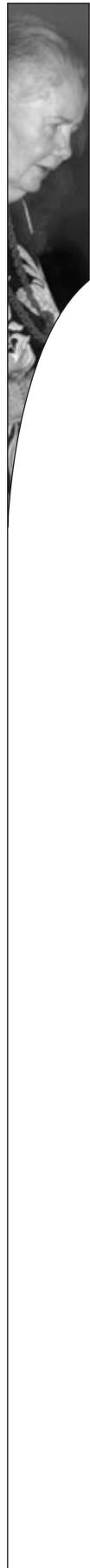
- (iii) used only in unusual circumstances and only after all reasonable less restrictive alternatives have been considered and rejected for reasons related to the resident's well-being which shall be documented showing evidence of consultation with appropriate professionals such as social workers and physical therapists. Less restrictive measures that would not clearly jeopardize the resident's safety shall not be rejected before a trial to demonstrate whether a more restrictive restraint would promote greater functional independence;
 - (iv) not used for staff convenience, for purposes of discipline or as substitutes for direct care, activities and other services;
 - (v) an enabler of the highest practicable physical, mental or psychosocial well-being; and
 - (vi) implemented only after the resident or designated representative, to the extent permitted by state law, agrees to this treatment alternative, except in an emergency situation in accordance with paragraph (6) of this subdivision. If the resident or designated representative withdraws agreement to the treatment after implementation, the usage shall be stopped.
- (3) When physical restraints are used:
- (i) they are used in accordance with paragraph (2) of this subdivision and are time limited. They are used for specified periods of time, properly applied allowing for some body movement and not impairing circulation;
 - (ii) they are monitored closely as specified in paragraph (5) of this subdivision; and
 - (iii) all plans for restraints are reviewed at a frequency determined by the resident's condition or more frequently if requested by the resident or designated representative. The clinical record shall include documentation of periodic reevaluation of the need for the restraint and efforts made to substitute other measures.
- (4) Policies and procedures regarding the ordering and use of physical restraints and the recording, reporting, monitoring and review and modification thereof are:
- (i) incorporated into the inservice education programs of the facility, with changes made in such programs when policies and procedures are modified; and
 - (ii) made known to all medical, nursing and other appropriate resident care personnel in advance of implementation.
- (5) When physical restraints are used the resident is:
- (i) released as frequently as necessary to meet resident care needs, but at least every two hours except when asleep in bed, then released as indicated by the type of restraint and by the residents' condition;
 - (ii) provided with changes of position, ambulation or exercise at the time of release; and
 - (iii) observed at least as frequently as at the time of dressing and undressing for any evidence of adverse effects, including but not limited to circulatory problems or skin abrasions.
- (6) In an emergency situation a physical restraint may only be used if it is:
- (i) approved by the medical director, attending physician or nursing director, or in his or her absence, by a registered professional nurse;
 - (ii) used for that specific emergency and for a limited period of time with physician consultation regarding the physical measure or safety device obtained within 24 hours;
 - (iii) applied under the direction of a licensed nurse who documents in the clinical record the circumstances necessitating the physical restraint and the resident's response; and (iv) monitored frequently by a licensed nurse until the resident is seen by a physician,
- (7) There are written policies specifying and defining each type of physical restraint that is acceptable and available in the facility and the purposes for which each shall be used. Locked restraints shall not be considered acceptable.
- (b) Staff treatment of residents. The nursing home shall develop and implement written policies and procedures that prohibit mistreatment, neglect or abuse of residents and misappropriation of resident property.
- (1) The facility shall:
- (i) not use, or permit verbal, mental, sexual or physical abuse, including corporal punishment, or involuntary seclusion of residents; and
 - (ii) not employ individuals who have:
 - (a) been found guilty of abusing, neglecting or mistreating individuals by a court of law; or
 - (b) had a finding entered into the New York State Nurse Aide Registry concerning abuse, neglect or mistreatment of residents or misappropriation of their property.
 - (iii) report any knowledge it has of actions by a court of law against an employee which would indicate unfitness for service as a nurse aide or other facility staff to the New York State Nurse Aide Registry or to appropriate licensing authorities.

- (2) The facility shall ensure that alleged violations involving mistreatment, neglect or abuse, including injuries of unknown source, are reported immediately to the administrator of the facility and, when required by law or regulation, to the Department of Health in accordance with Section 2803-d of the Public Health Law and Part 81 of this Title through established procedures.
- (3) The facility shall document that all alleged violations are thoroughly investigated and shall prevent further potential abuse while the investigation is in progress.
- (4) The results of all investigations shall be reported to the administrator or his or her designated representative or to other officials in accordance with State law and if the alleged violation is verified, effective corrective action shall be taken.

SECTION 415.5 QUALITY OF LIFE.

The facility shall care for its residents in a manner and in an environment that promotes maintenance or enhancement of each resident’s quality of life.

- (a) Dignity. The facility shall promote care for residents in a manner and in an environment that maintains or enhances each resident’s dignity and respect in full recognition of his or her individuality.
- (b) Self determination and participation. The resident shall have the right to:
 - (1) choose activities, schedules, and health care consistent with his or her interests, assessments and plans of care;
 - (2) interact with members of the community both inside and outside the facility; and
 - (3) make choices about aspects of his or her life in the facility that are significant to the resident.
- (c) Participation in resident and family groups.
 - (1) A resident shall have the right to organize and participate in resident groups in the facility.
 - (2) A resident’s family shall have the right to meet in the facility with the families of other residents in the facility.
 - (3) The facility shall provide a resident or family group, if one exists, with private space.
 - (4) Staff or visitors shall be allowed to attend meetings at the group’s invitation.
 - (5) The facility shall provide a designated staff person responsible for providing assistance and responding to written requests that result from group meetings.
 - (6) When a resident or family group exists, the facility shall listen to the views and act upon the grievances and recommendations of residents and families concerning proposed policy and operational decisions affecting resident care and life in the facility.
- (d) Participation in other activities.
 - (1) A resident shall have the right to participate in social, religious, and community activities that do not interfere with the rights of other residents in the facility.
 - (2) The facility shall arrange for opportunities for religious worship and counseling for any residents requesting such services.
- (e) Accommodation of needs. A resident shall have the right to:
 - (1) reside and receive services in the facility with reasonable accommodation of individual needs and preferences, except when the health or safety of the individual or other residents would be endangered; and
 - (2) receive notice before the resident’s . room or roommate in the facility is changed.
- (f) Activities.
 - (1) The facility shall provide for an ongoing program of activities designed to meet, in accordance with the comprehensive resident assessment, the interests and the physical, mental and psychosocial well being of each resident. The activities program shall:
 - (i) encourage the resident’s voluntary choice of activities and participation; and
 - (ii) promote and maintain the resident’s sense of usefulness to self and others, make his or her life more meaningful, stimulate and support the desire to use his or her physical and mental capabilities to the fullest extent and enable the resident to maintain a sense of usefulness and self respect.
 - (2) The activities program shall be directed by a qualified professional who:
 - (i) is a qualified therapeutic recreation specialist who is eligible for certification as a therapeutic recreation specialist by a recognized accrediting body on or after August 1, 1989; or
 - (ii) has two years of experience in an age appropriate social or recreational program within the last five years, one of which was full time in a patient or resident activities program in a health care setting; or
 - (iii) is a qualified occupational therapist or occupational therapy assistant.
 - (3) The activities program director shall be responsible to the administrator or his or her designee for administration and organization of the activities program and shall:
 - (i) assist in the selection and evaluation of activities program staff and volunteers;





- (ii) assign duties and supervise all activities staff and assigned volunteers;
 - (iii) ascertain, initially from the resident's attending physician, and on an ongoing basis from other appropriate professional staff, which residents are not permitted for specific documented medical reasons, to participate in certain activities;
 - (iv) develop and prepare with the resident and designated representatives, as appropriate, a written plan for individual, group and independent activities in accordance with his or her needs, interests and capabilities, and in recognition of his or her mental and physical needs and interests, as well as education and experiences;
 - (v) incorporate the activities into the resident's interdisciplinary care plan;
 - (vi) periodically, and at least quarterly, review with the resident, designated representative and staff, as appropriate his or her activities program participation and revise the plan as necessary;
 - (vii) coordinate and incorporate the activities program with the resident's schedule of other services through discussions With the interdisciplinary care team;
 - (viii) develop a monthly activities schedule based upon individual and group needs, interests and capabilities considering the special needs of residents including but not limited to dementias, physical handicaps, visual, hearing and speech deficiencies and wheelchair or bed restrictions;
 - (ix) post the current monthly activities schedule where it is accessible to residents and staff and can be easily read and provide a copy to residents upon request; and
 - (x) include in the resident's clinical record a quarterly assessment of the resident's degree of participation in, response to and benefit from the activities program.
- (4) The facility shall:
- (i) employ such additional qualified personnel responsible to the activities director, as are needed;
 - (ii) provide a planned program to include individual, group and independent programs for all residents at various times of the day and evening seven days of the week;
 - (iii) provide safe and adequate space and an adequate number and variety of equipment and supplies for the conduct of the on going program; and
 - (iv) develop, facilitate access and implement programs to encourage residents to establish and maintain community contacts.
- (g) Social services.
- (1) The facility shall provide for a social service program to meet the psychosocial needs of the individual resident which will provide services, based upon a comprehensive assessment, which will assure the maximum attainable quality of life for the residents, the residents' emotional and physical wellbeing, self determination, self respect and dignity. Such services shall include:
- (i) conducting an initial admissions assessment and interview with the resident and family to evaluate the appropriateness of placement and identify the need for special services;
 - (ii) interpreting the residents' rights to family and staff;
 - (iii) advocating for the resident with personal and social problems and problems involved with institutionalization;
 - (iv) facilitating needed communication with other disciplines on behalf of the residents, including medical, nursing, dietary, rehabilitation and psychiatric services;
 - (v) coordinating and monitoring needed available services for individual residents to assure optimum level of emotional, physical and psychological wellbeing and independence based upon educational background;
 - (vi) involving the resident, other disciplines and administration as appropriate regarding matters such as bed retention, room change, transfer and discharge;
 - (vii) interpreting residents' needs and behaviors and extending professional intervention to all levels of staff suggesting positive approaches; such as alternatives to the use of restraints and psychotropic drugs;
 - (viii) initiating and facilitating small group meetings of residents, family and staff directed at a fuller understanding of the institutionalized resident and fuller joint participation in improving the residents' emotional and physical wellbeing;
 - (ix) initiating and participating in interdisciplinary meetings and team conferences;
 - (x) providing assistance and support to residents' family members;
 - (xi) arranging for residents and families to meet with Department of Health surveillance staff as necessary;
 - (xii) participating, if requested by residents, in the organization and ongoing functioning of the resident and family councils;
 - (xiii) making available social work staff at varying schedules, including weekends and evenings;

- (xiv) coordinating and facilitating the referral of residents for needed and requested services and outside resources not available in the facility; and
 - (xv) organizing bereavement counseling for roommates, families and other affected individuals.
- (2) The facility shall employ a qualified social worker. Facilities with more than 120 beds shall employ such individual on a full time basis; facilities with 120 beds or fewer shall employ such individual on a full or part time basis. A qualified social worker for purposes of this Part is an individual who:
- (i) holds a master's degree in social work or is a certified social worker and has pertinent experience in a health care setting;
 - (ii) holds a bachelor's degree in social work, or in a related field, and has regular access through a contract which meets the provisions of subdivision (e) of section 415.26 of this Part with a person who meets the requirement of subparagraph (i) of this paragraph; or
 - (iii) had four years of social work experience in a nursing home in New York State prior to October 1, 1990, as a social work assistant or case aide and has regular access through a contract which meets the provisions of section 415.26(e) of this Part with a person who meets the requirement of subparagraph (i) of this paragraph.
- (h) Environment. The facility shall provide:
- (1) a safe, clean, comfortable and homelike environment, allowing the resident to use his or her personal belongings to the extent possible;
 - (2) housekeeping and maintenance services necessary to maintain a sanitary, orderly and comfortable interior;
 - (3) clean bed and bath linens that are in good condition;
 - (4) comfortable and safe temperature levels; and
 - (5) for the maintenance of comfortable sound levels.





Title 18 Department of Social Services

OFFICIAL COMPILATION OF CODES, RULES AND REGULATIONS OF THE STATE OF NEW YORK

TITLE 18. DEPARTMENT OF SOCIAL SERVICES

CHAPTER II. REGULATIONS OF THE DEPARTMENT OF SOCIAL SERVICES

SUBCHAPTER D. ADULT CARE FACILITIES

PART 485. GENERAL PROVISIONS

SECTION 485.2 DEFINITIONS.

(a) Adult care facility shall mean a family type home for adults, a shelter for adults, a residence for adults or an adult home, which provides temporary or long term residential care and services to adults who, though not requiring continual medical or nursing care as provided by facilities licensed or operated pursuant to article 28 of the Public Health Law or articles 19, 23, 29 and 31 of the Mental Hygiene Law, are, by reason of physical or other limitations associated with age, physical or mental disabilities or other factors, unable or substantially unable to live independently.

(b) Adult home shall mean an adult care facility established and operated for the purpose of providing long term residential care, room, board, housekeeping, personal care and supervision to five or more adults unrelated to the operator.

(c) Enriched housing program shall mean an adult care facility established and operated for the purpose of providing long term residential care to five or more adults, primarily persons 65 years of age or older, in community integrated settings resembling independent housing units. Such program shall provide or arrange the provision of room, and provide board, housekeeping, personal care and supervision.

(d) Residence for adults means an adult care facility established and operated for the purposes of providing long term residential care, room, board, housekeeping, case management, activities and supervision to five or more adults, unrelated to the operator, who are unable or substantially unable to live independently.

(e) Shelter for adults shall mean an adult care facility established and operated for the purpose of providing temporary residential care, room, board, supervision, information and referral, and, where required by the department or otherwise deemed necessary by the operator, social rehabilitation services, for adults in need of temporary accommodations supervision, and services. Such definition shall not include facilities providing such temporary residential services to fewer than 20 persons, unless such facility is operated by a social services district.

(f) Family type home for adults shall mean an adult care facility established and operated for the purpose of providing long term residential care, room, board, housekeeping, supervision and/or personal care to four or fewer adults unrelated to the operator.

(g) Unrelated to the operator of a family type home shall mean that the relationship between the operator and the resident is not that of spouse, parent or parent-in law, child or stepchild.

(h) Public home means an adult home, shelter for adults or residence for adults operated by a social services district.

(i) Private proprietary adult care facility shall mean an adult care facility which is operated for compensation and profit.

(j) An operator shall include any natural person or entity which provides or purports to provide residential care and services in an adult care facility.

(k) Operating certificate shall mean a time limited, nontransferable document issued by the department to signify approval to operate an adult care facility.

(l) Application shall mean the process of submitting prescribed data and information to the department for an operating certificate for a proposed facility, or for the modification or renewal of the operating certificate of an existing facility.

(m) Certification shall mean the issuance of an operating certificate by the department, following appropriate review and such site visits as may be necessary, authorizing an operator to operate an adult care facility.

- (n) Determination of public need is the process by which the department, in consultation with appropriate State and local planning agencies, determines whether there is a need for more adult care facility beds in a prescribed geographic area.
- (o) Prescribed geographic area shall mean the county in which the proposed program is located, unless:
- (1) the department determines that another geographic area is more appropriate because an applicant proposes to serve a special, ethnic or religious population, or because of population density, adult care facility distribution or service availability; or
 - (2) the applicant demonstrates, to the satisfaction of the department, that another geographic area defining the service area is more appropriate.
- (p) Department shall mean the New York State Department of Social Services.
- (q) Commissioner shall mean the Commissioner of the New York State Department of Social Services.
- (r)
- (1) Services for nonresidents in adult homes, residences for adults and enriched housing programs means an organized program of services which an operator of an adult home, residence for adults or enriched housing program is authorized to provide to residents of such facilities but which are provided to nonresidents who are aged or disabled for the purpose of enabling such persons to remain in or return to the community. Such services may include an organized day program, temporary residential care, or other services the facility is authorized to provide.
 - (2) Eligible nonresident participant means a person 18 years of age or older who is not a resident of an adult home, residence for adults or enriched housing program and who, by reason of social, physical, and/or mental dependencies, requires nonresident services provided by such facilities or programs in order to remain in or return to the community.
 - (3) Day program means an organized program for nonresidents of adult homes, residences for adults or enriched housing programs which includes personal care, supervision and such other services which the operator is authorized to provide to residents of such facilities but which are provided for less than 24 hours during any period of the day or night.
 - (4) Temporary residential care means the provision of care to frail or disabled adults on behalf of or in the absence of the person's caregiver for up to six weeks in any 12 month period, in an adult home, residence for adults or enriched housing program. Care includes those services that the adult home, residence for adults or enriched housing program is authorized to provide to residents of such facilities.
- (s) Assisted living program means an entity which is approved to operate pursuant to section 485.6(n) of this Part, and which is established and operated for the purpose of providing long term residential care, room, board, housekeeping, personal care, supervision, and providing or arranging for home health services to five or more eligible adults unrelated to the operator.

SECTION 485.13 CERTIFIED LONG TERM CARE OMBUDSMEN.

- (a)
- (1) An operator must not restrict or prohibit the access to the residents of the facility nor interfere with the performance of the official duties of a duly authorized ombudsman certified by the State Office for the Aging.
 - (2) Such access shall be permitted for at least 10 hours between 9 a.m. and 8 p.m. daily.
 - (3) In addition to the access permitted under paragraph (2) of this subdivision, an operator shall not restrict access at other times if the ombudsman is seeking to investigate a complaint or is responding to a specific request of a resident.
 - (4) The operator shall not interfere with the privacy and confidentiality of the visits between the resident and the ombudsman.
 - (5) An operator may not retaliate nor take reprisals against any resident, employee or other person for having filed a complaint with or having provided information to a duly authorized ombudsman.
- (b)
- (1) The operator shall not restrict or prohibit access to resident records maintained by the operator, provided that:
 - (i) the person seeking access has been specially designated as a records access ombudsman by the director of the State Office for the Aging; and
 - (ii) the resident or, where appropriate, a committee for an incompetent, has given express written consent.
 - (2) Access to records shall be permitted between 9 a.m. and 5 p.m., Monday through Friday.
 - (3) The operator shall designate a member or members of staff who shall be responsible for providing access to such records and, where necessary, interpretation of such records.
 - (4) Records access ombudsmen shall have the right to photocopy onsite such records; however, records shall not be removed from the facility by the ombudsman.
 - (5) The operator may charge a reasonable fee, not to exceed \$1 per page, for photocopying.





- (6) Disclosure to a duly designated records access ombudsman, pursuant to the express written consent of a resident, shall not, based solely on such disclosure, give rise to any claim as to a breach of confidentiality by the operator.
- (7) Nothing in this section shall be construed to permit access to a physician's records, clergy records, or to other community service agency records, which are not maintained by the operator as part of the resident's records.
- (c) The operator shall require anyone seeking access to the facility or to resident records as an authorized ombudsman to show identification and to sign a visitor's register

SECTION 485.14 ACCESS TO ADULT-CARE FACILITIES.

- (a) An operator shall not restrict or prohibit access to the facility by:
 - (1) family members, guardians, friends of an individual resident and legal representatives, legal counsels and case managers;
 - (2) individuals representing community organizations or service agencies who will provide, free of charge, a service or educational program to residents; or
 - (3) an employee or representative of any public or private not-for-profit corporation, community organization or association whose primary purposes for visiting include assisting residents in resolving problems and complaints concerning their care and treatment, and in securing adequate services to meet their needs.The operator shall make available a common area of the facility for such visits.
- (b) Such access shall be permitted for at least 10 hours between 9 a.m. and 8 p.m. daily.
- (c) The operator may require anyone seeking access to the facility to sign a visitor's register or like record.
- (d) The operator shall not interfere with confidential visits with residents and persons assured access under this section.
- (e) Persons assured access under this section shall not enter the living area of any resident without identifying themselves to the resident, stating the purpose of the visit, and receiving the permission of the resident and the resident's roommate to enter the living area.
- (f) A resident shall have the right to terminate or deny any visit from persons assured access under this section.
- (g) Notwithstanding subdivision (a) of this section, the operator may restrict or prohibit access to the facility or interfere with confidential visits with residents by individuals who the operator has reasonable cause to believe would directly endanger the safety of such residents.
- (h) If the operator denies access for reasonable cause, the operator shall:
 - (1) record a written statement of the incident, including the reasons for denial, the date and time and identification of the individuals involved;
 - (2) maintain the statement at the facility; and
 - (3) make such statement available upon request to the resident involved and persons denied access.
- (i) If the operator of a facility denies access, the person denied access may bring an action in Supreme Court in the county in which the facility is located for an order granting such person access to such facility. If the court finds that such denial was made in bad faith, the operator of the facility shall be liable for all costs, including reasonable attorney's fees, and the court may, in its discretion, assess a civil penalty not to exceed \$50 per day for each day such access was denied.
- (j) Public or private not-for-profit corporations, community organizations or associations who wish to have their employees or representatives assured access to facilities, under paragraph (a)(3) of this section, shall register with the department. Corporate organizations shall file a copy of the certificate of incorporation; others shall file agency bylaws or a written statement of purposes, including a description of the services or assistance the organization intends to make available to residents.
- (k) The department shall maintain a registry of such organizations and shall provide periodic notice of changes to operators.

**OFFICIAL COMPILATION OF CODES, RULES AND
REGULATIONS OF THE STATE OF NEW YORK
TITLE 18. DEPARTMENT OF SOCIAL SERVICES
CHAPTER II. REGULATIONS OF THE DEPARTMENT OF SOCIAL
SERVICES
SUBCHAPTER D. ADULT CARE FACILITIES
PART 487. STANDARDS FOR ADULT HOMES**



SECTION 487.2 DEFINITIONS.

- (a) An adult home is defined as an adult care facility established and operated for the purpose of providing long term residential care, room, board, housekeeping, personal care and supervision to five or more adults unrelated to the operator.
- (b) A private proprietary adult home shall mean an adult home which is operated for compensation and profit.

SECTION 487.4 ADMISSION STANDARDS.

- (a) An operator shall admit, retain and care for only those individuals who do not require services beyond those the operator is permitted by law and regulation to provide.
- (b) An operator shall not accept nor retain any person who:
- (1) is in need of continual medical or nursing care or supervision as provided by facilities licensed pursuant to article 28 of the Public Health Law, or licensed or operated pursuant to articles 19, 23, 29 and 31 of the Mental Hygiene Law;
 - (2) suffers from a serious and persistent mental disability sufficient to warrant placement in a residential facility licensed pursuant to article 19, 23, 29 or 31 of the Mental Hygiene Law;
 - (3) requires health or mental health services, which are not available or cannot be provided safely and effectively by local service agencies or providers;
 - (4) causes, or is likely to cause, danger to himself or others;
 - (5) repeatedly behaves in a manner which directly impairs the well being, care or safety of the resident or other residents, or which substantially interferes with the orderly operation of the facility;
 - (6) has a medical condition which is unstable and which requires continual skilled observation of symptoms and reactions or accurate recording of such skilled observations for the purposes of reporting to the resident's physician;
 - (7) refuses or is unable to comply with a prescribed treatment program, including but not limited to a prescribed medications regimen when such failure causes, or is likely to cause, in the judgment of a physician, life threatening danger to the resident or others;
 - (8) is chronically bedfast;
 - (9) is chronically chairfast and unable to transfer, or chronically requires the physical assistance of another person to transfer;
 - (10) chronically requires the physical assistance of another person in order to walk;
 - (11) chronically requires the physical assistance of another person to climb or descend stairs, unless assignment on a floor with ground level egress can be made;
 - (12) has chronic unmanaged urinary or bowel incontinence;
 - (13) suffers from a communicable disease or health condition which constitutes a danger to other residents and staff;
 - (14) is dependent on medical equipment, unless it has been demonstrated that:
 - (i) the equipment presents no safety hazard;
 - (ii) use of the equipment does not restrict the individual to his room, impede the individual in the event of evacuation, or inhibit participation in the routine activities of the home;
 - (iii) use of the equipment does not restrict or impede the activities of other residents;
 - (iv) the individual is able to use and maintain the equipment with only intermittent or occasional assistance from medical personnel;
 - (v) such assistance, if needed, is available from approved community resources; and
 - (vi) each required medical evaluation attests to the individual's ability to use and maintain the equipment;



- (15) engages in alcohol or drug use which results in aggressive or destructive behavior; or
- (16) is under 18 years of age; or, in a public adult home, under 16 years of age.
- (c) An operator shall not admit or retain a number of persons in excess of the capacity specified on the operating certificate.
- (d) An operator shall not admit an individual before a determination has been made that the facility program can support the physical and social needs of the resident.
- (e) Such a determination shall be based upon:
 - (1) receipt and consideration of a medical evaluation;
 - (2) conduct of an interview between the administrator, or a designee responsible for admission and retention decisions, and the resident and the resident's representative(s), if any; and
 - (3) in the event that a proposed resident has a known history of chronic mental disability, or the medical evaluation or resident interview suggests such disability, then a mental health evaluation must be conducted.
- (f) Each medical evaluation (DSS 3122 or an approved substitute) shall be a written, and signed report from a physician which includes:
 - (1) the date of examination, significant medical history and current conditions, known allergies, the prescribed medication regimen, including information on the applicant's ability to self administer medications, recommendations for diet, exercise, recreation, frequency of medical examinations and assistance needed in the activities of daily living;
 - (2) a statement that the resident is not medically or mentally unsuited for care in the facility;
 - (3) a statement that the resident does not require placement in a hospital or residential health care facility; and
 - (4) a statement that the physician has physically examined the resident within 30 days prior to the date of admission or, for required annual evaluations, within 30 days prior to the date of the report.
- (g) Each mental health evaluation shall be a written and signed report, from a psychiatrist, physician, registered nurse, certified psychologist or certified social worker who has experience in the assessment and treatment of mental illness, which includes:
 - (1) significant mental health history and current conditions;
 - (2) a statement that the resident is not mentally unsuited for care in the facility;
 - (3) a statement that the resident does not evidence need for placement in a residential treatment facility licensed or operated pursuant to article 19, 23, 29 or 31 of the Mental Hygiene Law;
 - (4) a statement that the person signing the report has conducted a face to face examination of the resident within 30 days of the date of admission or, for required annual evaluations, within 30 days of the date of the report.
- (h) Each resident interview shall:
 - (1) include explanation of the conditions of residency, including but not limited to the admission agreement, resident rights and responsibilities, facility rules and regulations and the personal allowance protections available to Supplemental Security Income or HR recipients;
 - (2) ascertain that the facility program can:
 - (i) meet the physical needs and personal care needs of the resident, including dietary needs occasioned by cultural or religious practice or preference or medical prescription; and
 - (ii) meet the social needs of the resident through facility programs and the fostering and maintenance of family and community ties and associations; and
 - (3) be summarized in writing, including the date of the interview and identification of those present.
- (i) Medical and mental health evaluations, if required, shall be conducted:
 - (1) within 30 days prior to the date of admission; and
 - (2) whenever a change in the resident's condition warrants, but no less than once in every 12 months.
- (j) The operator shall assist a resident in obtaining any required evaluations.
- (k) For any residents who cannot be retained under the conditions set forth in subdivision (b) of this section:
 - (1) the operator shall make persistent efforts to secure appropriate alternative placement and shall document such efforts;
 - (2) persistent efforts shall be defined as:
 - (i) assisting the resident or resident's representative with filing five applications for each such resident with appropriate facilities;
 - (ii) following up by telephone every two weeks on the status of the applications;
 - (iii) if an application is rejected, the operator shall assist the resident or resident's representative in filing an application to another facility within five working days of the date of rejection; and



- (iv) if the resident is not placed, the operator must notify the regional office in writing, every 90 days from the filing of the first application, of the name of the resident and any pending and rejected applications.
- (l) Notwithstanding subdivision (i) of this section, medical evaluations shall not be required of a competent adult who relies upon or is being furnished treatment by spiritual means through prayer, in lieu of medical treatment, in accordance with the tenets and practices of a recognized church or religious denomination of which the resident is a member or bona fide adherent. In such cases the operator shall:
 - (1) require documentation of the resident's standing as a member; and
 - (2) adhere to the admission and retention standards set forth in subdivision (b) of this section.
- (m) The operator shall not admit nor accept for return an individual directly from a general or special hospital, psychiatric center, developmental center, skilled nursing or health related facility, without a statement from the referral source which details significant medical conditions, prescribed health or mental health regimens and such psychosocial information as may be available to help the operator plan an adequate level of care for the resident. This statement may substitute for the medical or mental health evaluations if the requirements of subdivision (f) or (g) of this section are met.
- (n) In facilities with a significant number of mentally disabled persons, the mental health organization or agency with which the operator has executed the agreement required by section 487.7(b) of this Part shall be afforded reasonable opportunity to participate in the admission or retention assessment of persons who require a mental health evaluation or who would be eligible for the mental health organization's services by reason of residency in the adult home. Such participation shall be solely for the purpose of assisting the operator to determine if the operator and available mental health services can meet the needs of the resident.
- (o) An applicant shall receive at or prior to the admissions interview:
 - (1) a copy of the admission agreement;
 - (2) a copy of the statement of resident rights;
 - (3) a copy of any facility regulations relating to resident activities, office and visiting hours and like information; and
 - (4) if made available to the operator, by the LongTerm Care Ombudsman Program, a fact sheet about the program and the listing of legal services or advocacy agencies made available by the department.
- (p) Each applicant for admission shall have the opportunity to review a copy of the most recent report of inspection issued by the department to the facility.
- (q) If the applicant/resident is sight impaired or hearing impaired or otherwise unable to comprehend English or printed matter, the operator shall arrange for conduct of the interview and transmission of the contents of the admission agreement, the statement of rights and responsibilities and facility information in a manner comprehensible to the applicant.

SECTION 487.5 RESIDENT PROTECTIONS.

- (a) Resident rights.
 - (1) Each operator shall adopt a statement of the rights and responsibilities of residents and shall treat each resident in accord with the principles contained in the statement.
 - (2) A copy of the statement of rights issued by the department shall be posted in a conspicuous location in a public area of the facility.
 - (3) At a minimum, the operator shall afford each resident the following rights and protections:
 - (i) A resident's civil rights shall not be infringed.
 - (ii) A resident's religious liberties shall not be infringed.
 - (iii) A resident shall have the right to have private, written and verbal communications with anyone of his/her choice.
 - (iv) A resident shall have the right to present grievances on his/her behalf, or the behalf of other residents, to the administrator or facility staff, the department or other government officials or any other parties without fear of reprisal.
 - (v) A resident shall have the right to join with other residents or individuals to work for improvements in resident care.
 - (vi) A resident shall have the right to manage his or her own financial affairs.
 - (vii) A resident shall have the right to privacy in his/her own room and in caring for personal needs.
 - (viii) A resident shall have the right to confidential treatment of personal, social, financial and health records.
 - (ix) A resident shall have the right to receive courteous, fair and respectful care and treatment at all times, and shall not be physically, mentally or emotionally abused or neglected in any manner.
 - (x) A resident shall not be restrained nor locked in a room at any time.
 - (xi) A resident shall have the right to receive and send mail or any other correspondence unopened and without interception or interference.



- (xii) A resident shall be permitted to leave and return to the facility and grounds at reasonable hours.
- (xiii) A resident shall not be obliged to perform work.
- (xiv) A resident shall not be permitted, or obliged, to provide any operator or agent of the operator any gratuity in any form for services provided or arranged for in accord with law or regulation.
- (xv) A resident must have the right to have his/her version of the events leading to an accident or incident in which such resident is involved included on the reports of such accidents or incidents.

(b) Resident organizations.

- (1) The operator shall encourage and assist residents to organize and maintain committees, councils, or such other self governing body as the residents may choose.
- (2) The operator shall:
 - (i) assure that the residents' organization:
 - (a) meets as often as the membership deems necessary;
 - (b) is chaired and directed by the residents; and
 - (c) may meet with any member of the supervisory staff, provided that reasonable notice of the request is given to such staff;
 - (ii) appoint a staff person to act as an advisor to the residents' organization, who shall serve as a liaison between the organization and administration to report all problems, issues and suggestions discussed by the residents which require administrative action; and
 - (iii) assure that any complaints, problems or issues reported by the residents' organization to the designated staff person or administration be addressed, and that a written report addressing the problems, issues or suggestions be sent to the organization.

(c) Grievances and recommendations.

- (1) The operator shall develop written procedures and shall establish and maintain a system to receive and respond to grievances and recommendations for change or improvement in facility operations and programs which are presented by residents.
- (2) The system shall include:
 - (i) identification of staff to whom grievances and recommendations may be made;
 - (ii) procedures to submit grievances and recommendations which also include a procedure for confidential treatment of grievances and recommendations if requested;
 - (iii) procedures for evaluation and the initiation of action or resolution which are timely and protect the rights of those involved; and
 - (iv) procedures for informing residents of action and resolution.
- (3) The operator shall post the procedures for the submission of grievances and recommendations, including the identity of staff to whom the grievances and recommendations may be addressed.

(d) Admission agreements.

- (1)
 - (i) Each operator shall execute with and provide to each resident, at or prior to admission and periodically thereafter as changes necessitate, a written admission agreement which shall constitute the entire agreement of the parties and shall contain at least the provisions required by paragraph (6) of this subdivision,
 - (ii) The admission agreement shall be dated and signed by the operator, the resident and, if appropriate, another person acting as an agent for the resident.
- (2) The operator shall comply with all provisions of the admission agreement.
- (3) Any modification or provision of the agreement which is not in compliance with law or regulation shall be null and void.
- (4) Any waiver by the resident of any provision of the admission agreement required by law or regulation shall be null and void.
- (5) The admission agreement shall be printed in legible, easily read type.
- (6) The admission agreement shall, at a minimum:
 - (i) state the effective date;
 - (ii) state the due dates for payment;
 - (iii) enumerate the services, material, equipment and food required by law or regulation;
 - (iv) state the basic monthly, weekly or daily payment for services, material, equipment and food required by law or regulation;



(v) enumerate in detail a schedule of any other services, materials, equipment and food which the operator agrees to furnish and supply to the residents during the period of the admission agreement. Such schedule shall include the basis for charges for such supplemental services and supplies;

(vi) guarantee that charges for such supplemental services and supplies shall be made only at resident option and only for services and supplies actually provided to the resident;

(vii) detail the conditions and procedures under which the operator may adjust the basic monthly, weekly or daily rate or charges for supplemental services and supplies. Such conditions are limited to:

(a) the express written approval and authority of the resident or legal representative; or

(b) in the event of any emergency arising which affects such resident, additional charges may be assessed for the benefit of such residents as are reasonable and necessary for services, material, equipment and food furnished and supplied during such emergency; or

(c) the provision of additional care, services or supplies, upon the express order of the primary physician of the resident; or

(d) the provision of 30 days' written notice to the resident and his/her representative, if any, of additional charges and expenses due to increased cost of maintenance and operation;

(viii) state the actual rate charged the resident and accepted by the operator in satisfaction of the admission agreement;

(ix) guarantee that neither the operator, administrator nor any employee or agent shall accept any remuneration or gratuity in any form for any services provided or arranged for as specified by statute, regulation or agreement;

(x) enumerate any and all money, property or things of value given or promised to be given to the operator, on admission or at any other time, including any agreements made by third parties for payments for the benefit of a resident;

(xi) state that the operator offers to each resident who is a recipient of SSI or HR, or representative payee, an opportunity to place personal funds for incidental use in a facility maintained resident account, and further indicate resident and representative payee acceptance or rejection of this offer;

(xii) state that a signator other than the resident, who does not choose to place the resident's personal allowance funds in a facility maintained account, will comply with the Supplemental Security Income (SSI) or Home Relief (HR) personal allowance requirement;

(xiii) state charge(s), which may not exceed the basic rate, to be levied for reserving a residential space in the event of temporary absence of the resident, and the length of time the reservation shall apply;

(xiv) state the terms and conditions under which the resident or operator may terminate occupancy;

(xv) state the grounds under which the operator may terminate the admission agreement without the consent of the resident;

(xvi) detail the operator's obligation to:

(a) give at least 30 days' written notice to the resident, the resident's next of kin and the person designated in the admission agreement as the responsible party, specifying the grounds for termination and date of discharge and advising that the resident has the right to object to, and contest, involuntary termination;

(b) provide a list of free local legal services and advocacy resources, including the local social services district; and

(c) obtain prior court approval if the resident objects to the involuntary termination;

(xvii) provide for a prorated refund of advance payments, based on the rate, the actual days of residency, bed reservation and the terms for notice;

(xviii) guarantee that, upon discharge or transfer, the resident or the resident's representative shall receive a final written statement of his or her payment account and personal allowance account, and be immediately returned any monies, property or things of value held in trust or in custody by the operator or which come into possession of the operator after discharge or transfer;

(xix) state that the resident agrees to provide the operator, prior to admission and at least every 12 months thereafter, a dated and signed medical evaluation which conforms to the requirements of section 487.4(f) of this Part;

(xx) state that the resident agrees to inform the operator of change in health status or medications, as they occur;

(xxi) state that the resident agrees to obey all reasonable rules of the facility and to respect the rights and property of the other residents; and

(xxii) state that waiver by a resident of any provision of the admission agreement is null and void.

(e) After September 1, 1984, an operator shall not enter into any contract or agreement with the resident or the resident's next of kin or sponsor for life care of the resident in the adult home.

(f) Termination of admission agreements.

(1) Every resident shall have the right to terminate his admission agreement.



- (2) Voluntary and mutual termination of the admission agreement. Where notice of termination has been given by the operator and the resident leaves voluntarily, it is not necessary for the operator to commence a court proceeding.
- (3) The operator of an adult home shall, in order to terminate the admission agreement of a resident and discharge him/her from the facility, give at least 30 days' written notice, on a form prescribed by the department, to:
 - (i) the resident;
 - (ii) the resident's next of kin, if known; and
 - (iii) any person designated in the admission agreement as the responsible party, other than next of kin, if any.
- (4) The termination notice must indicate:
 - (i) the reason for termination;
 - (ii) the date of termination;
 - (iii) that the resident has the right to object to the termination of the agreement and the subsequent discharge;
 - (iv) that, if the resident does object, he may remain in the facility while the operator commences a court proceeding, and unless the court finds in favor of the operator.
- (5) In addition to the prescribed termination notice, the operator shall furnish to the resident a list of agencies, including the Long Term Care Ombudsman Program, providing free legal services and agencies engaged in resident advocacy services within the geographic vicinity of the facility. Such lists must be provided or approved by the department and shall include names, addresses and telephone numbers.
- (6) A copy of the termination notice shall be filed by the operator with the appropriate regional office within five days after the notice is served upon the resident.
- (7) Transfer of a resident without giving at least 30 days' notice may be arranged by the operator under the following circumstances:
 - (i) When a resident develops a communicable disease, medical or mental condition, or sustains an injury such that continual skilled medical and nursing services are required, arrangements shall be made by the operator for appropriate professional evaluation and transfer to an appropriate facility.
 - (ii) In the event that a resident's behavior poses an imminent risk of death or imminent risk of serious physical harm to himself or others, the operator shall arrange for transfer of the individual to an appropriate and safe location.
- (8) In the event that a resident's behavior poses an imminent risk of death or serious physical harm to himself or any other person, the operator should, whenever possible, seek the assistance of a peace officer, acting pursuant to his special duties, or a police officer who is a member of an authorized police department or force or a sheriff's department, in transferring the resident to a safe location.
- (9) When the basis for a transfer no longer exists, and the resident is deemed appropriate for placement in the facility, the operator shall readmit him, even if involuntary termination proceedings have begun.
- (10) Transfer of a resident without notice of termination shall not be deemed a termination of the admission agreement. Such removal shall not relieve the operator from the requirement of proceeding, subsequent to the removal of the resident, to terminate the admission agreement.
- (11) When the operator proceeds to terminate the admission agreement of a resident transferred without notice of termination, he shall insure that the written notice shall be hand delivered to the resident at the location to which he has been removed. If such hand delivery is not possible, then notice shall be given by any of the methods provided by law for personal service upon a natural person (section 308, Civil Practice Law and Rules).
- (12) When a receiver has been appointed pursuant to the provisions of section 461 f of the Social Services Law, and is providing for the orderly transfer of all residents in the facility to other facilities or is making other provisions for the residents' continued safety and care, the receiver may terminate admission agreements and arrange for the transfer of all residents to appropriate settings without regard to the notice and court review requirements of this subdivision.
- (13) Notwithstanding paragraph (12), a receiver shall adhere to the requirements of this subdivision in any instance where termination of an admission agreement is not directly related to the closure of a facility.
- (14) No operator shall terminate an admission agreement and involuntarily discharge a resident, except for the following reasons:
 - (i) the resident requires continual medical or nursing care which the adult care facility is not licensed to provide;
 - (ii) the resident's behavior poses imminent risk of death or imminent risk of serious physical harm to himself or anyone else;
 - (iii) the resident fails to make timely payment for all authorized charges, expenses and other assessments, if any, for services, including use and occupancy of the premises, materials, equipment and food which the resident has agreed to pay pursuant to the resident's admission agreement;
 - (iv) the resident repeatedly behaves in a manner that directly impairs the well being, care or safety of the resident or any other resident or which substantially interferes with the orderly operation of the facility;

- (v) the facility has had its operating certificate limited, revoked or temporarily suspended, or the operator has voluntarily surrendered the operating certificate of the facility to the department; or
- (vi) a receiver has been appointed pursuant to the provisions of section 461 f of the Social Services Law, and is providing for the orderly transfer of all residents in the facility to other facilities or is making other provision for the residents' continued safety and care.

(15)

- (i) If failure to make timely payment resulted from an interruption in the receipt by the resident of any public benefits to which he is entitled, no admission agreement may be involuntarily terminated unless the operator, during the 30 day notice period, assists the resident in obtaining such benefits, or any other available supplemental public benefits.
- (ii) Documented failure of the resident to cooperate with such efforts by the operator shall be considered evidence of assistance.

(16) If the resident indicates to the operator, within 30 days of receipt of notice, that he objects to the termination of the agreement, or if at the end of 30 days the resident remains in the facility, the operator shall institute a special proceeding pursuant to section 461 h of the Social Services Law prior to termination and discharge.

(17) While legal action is in progress, the operator shall not:

- (i) seek to amend the admission agreement in effect as of the date of the notice of termination;
- (ii) fail to provide any of the care and services required by department regulations and the admission agreement; or
- (iii) engage in any action to intimidate or harass the resident.

(18) Both the resident and the operator are free to seek any other judicial relief to which they may be entitled.

(19) The operator shall assist any resident, proposed to be transferred or discharged pursuant to this subdivision, to the extent necessary to assure, whenever practicable, the resident's placement in care settings which are adequate, appropriate and consistent with his wishes.

487.6 RESIDENT FUNDS AND VALUABLES.

(a) Funds.

(1) The operator shall issue a receipt to a resident for any funds received for:

- (i) payment of the facility rate;
- (ii) payment of appropriate supplemental charges;
- (iii) payment of funds owed to the operator by the resident;
- (iv) deposits to a personal allowance account established pursuant to section 485.12 of this Title;
- (v) any other funds held in custody for the resident; and
- (vi) any other funds received by the operator from the resident.

(2) An operator who receives any funds from a resident shall issue a signed receipt to the resident which contains the following information:

- (i) the date of the receipt;
- (ii) the amount of funds received;
- (iii) the purpose of the transaction;
- (iv) the name of the resident; and
- (v) the signature of the person receiving the funds.

(3) Resident personal allowance accounts or other personal funds shall not be mingled with the personal funds of the operator or the operating funds of the facility, nor become an asset of the operator.

(4) Personal allowance accounts and accounts for other resident funds shall be kept separate and distinct from each other and from any other account(s).

(5) Upon change of operator, the current operator shall transfer all records to the proposed operator and provide the proposed operator with a written statement of all resident personal allowance accounts, and other resident accounts with funds held in custody. This statement shall document that the balance being transferred in each resident fund account is true and accurate as of the proposed date of transfer, and shall be confirmed by resident signature(s).

(6) Upon change of operator, the new operator shall assume, in writing, responsibility for account balances of funds of residents turned over upon the change of operator, together with responsibility for all requirements of this section.

(7) Records of all transactions shall be maintained as part of the facility records.

(b) Personal allowance.





- (1) Each resident who is receiving Supplemental Security Income (SSI) or Home Relief (HR) benefits, and who is entitled to a monthly personal allowance by section 131-o of the Social Services Law or subdivision 352.8(c) of this Title, shall receive that allowance in accordance with the requirements of section 485.12 of this Title and subdivision (c) of this section.
 - (2) In the event that the resident negotiates the full SSI or HR check to the operator, distribution of the personal allowance shall be made to the resident within two banking days of the transaction.
 - (3) The operator shall obtain written acknowledgment monthly from each resident, confirming receipt of his/her personal allowance.
- (c) Personal allowance accounts.
- (1) At the time of admission and at the time of the first increase in the personal allowance occurring in any calendar year, the operator shall, in writing, offer an SSI or HR recipient or the recipient's representative, if any, an opportunity to place personal allowance funds for incidental use in a facility-maintained account.
 - (2) The operator shall provide for the safekeeping and accountability of a personal allowance account.
 - (3) The operator shall hold resident funds in custody for the sole use of the resident and shall not use these funds for any other purpose.
 - (4) No service fee shall be charged by the operator for maintaining a personal allowance account for a resident who is in receipt of SSI or HR.
 - (5) Residents shall have access to personal allowance accounts at least four hours daily, Monday through Friday. The access schedule must be posted and may not be changed without five days' advance notice.
 - (6) Upon request, each resident shall have the opportunity, during scheduled access hours, to examine his/her personal allowance account record including deposits, withdrawals and current balance.
 - (7) If the operator deposits resident personal allowance funds in individual or collective interest-bearing bank accounts, the operator must develop a written procedure for the equitable distribution of interest to each resident's account. Such distribution shall be made quarterly.
 - (8) The operator shall maintain individual records for each resident who has a personal allowance account, showing all deposits, withdrawals and the current balance.
 - (9) The operator shall document all such personal allowance transactions on a personal allowance ledger (DSS-2854) and maintain all paid bills, vouchers and other appropriate payment and receipt documentation in the manner prescribed by the department.
 - (10) The operator shall reconcile personal allowance account balances to the total personal allowance funds maintained by the facility at least monthly. The reconciliation requirement shall be met by maintaining a personal allowance summary (DSS-2855).
 - (11) No alternative system of recordkeeping for resident personal allowance accounts may be substituted for the above without the prior written consent of the department.
 - (12) At least quarterly, the operator shall give each resident who has a personal allowance account, a statement showing total deposits, withdrawals and current balance of the resident's account and secure the resident's acknowledgment, in writing, of the accuracy of the statement.
 - (13) The operator shall not require a resident to maintain a personal allowance account at the facility.
 - (14) The operator shall not be required to maintain any personal allowance account in amounts in excess of the SSI resource limit.
 - (15) The resident may terminate the personal allowance account at any time.
- (d) Other funds held in custody.
- (1) The operator may offer an SSI or HR recipient or any other resident the opportunity to place funds other than personal allowance funds provided pursuant to section 485.12 of this Title in the operator's custody.
 - (2) Such funds shall not be mingled with any personal allowance funds maintained pursuant to subdivision (b) of this section.
 - (3) The operator shall maintain records and provide for the security of all funds which the resident has voluntarily given to the operator and the operator has voluntarily accepted to hold in his/her custody or to exercise control over.
 - (4) The operator shall obtain written authorization from the resident to hold the resident's funds.
 - (5) Records of all transactions shall be maintained as part of the facility records.
- (e) Resident property and valuables.
- (1) The operator may offer a resident the opportunity to place property or items of value in the operator's custody.
 - (2) The operator shall maintain inventory records and provide for the security of all property or items of value which the resident has voluntarily given to the operator to hold in custody or to exercise control over.

- (3) The operator shall obtain written authorization from the resident to hold property or items of value, and shall provide each resident with a receipt.
- (4) Resident property or items of value shall be segregated from the assets of the operator.
- (5) Records of all transactions shall be maintained as part of the facility records.
- (f) Return of resident funds and valuables.
 - (1) At the time of discharge or termination of the admission agreement, but in no case more than three business days after the resident leaves the facility, the operator shall provide the resident or the resident's representative with:
 - (i) a final written accounting of the resident's payment and personal fund accounts;
 - (ii) a check for the outstanding balance, if any; and
 - (iii) any property or things of value held in trust or in custody by the operator.
 - (2) The operator shall refund, on the basis of a per diem proration, any advance payment(s) made by the resident.
 - (3) The operator shall return to the resident, representative or other appropriate individual or agency, any property or items of value which come into the possession of the operator after discharge or transfer.
 - (4) Upon the death of a resident, the operator shall contact the next of kin or legal representative and arrange for the transfer of all property of the individual. When the whereabouts of the next of kin or legal representative are unknown, the operator shall contact the appropriate Surrogate's Court to arrange for the transfer.

SECTION 487.8 FOOD SERVICE.

- (a) The operator shall provide meals which are balanced, nutritious and adequate in amount and content to meet the daily dietary needs of residents.
- (b) The operator shall provide at a minimum:
 - (1) three meals a day, served at regularly scheduled times; and
 - (2) a nutritious evening snack.
- (c) Information on each resident's prescribed dietary regimen and food allergies shall be available in the food service area and shall be used in the planning, preparation and service of resident meals and snacks.
- (d) Menu planning.
 - (1) Menus for regular and modified diets and snacks are to be planned to furnish sufficient nutrients and calories to meet the recommended dietary allowances of the Food and Nutrition Board of the National Academy of Science, National Research Council, adjusted for age, sex and activity.
 - (2) The following food groups shall be included in each daily menu:
 - (i) milk--two or more cups served as beverage or used in cooking. Fortified whole, skim or low fat milk, flavored whole or fortified milk, buttermilk, cheese may be used. Cheese may be used as milk or meat, but not both;
 - (ii) meats--two or more servings of meat, fish, poultry, eggs, cheese or other equivalents. Each serving must provide an edible portion of at least two ounces;
 - (iii) vegetables and fruits--four or more servings of at least one-half cup each, citrus fruit or other fruit and vegetable with vitamin C should be used daily. A dark green or deep yellow vegetable or fruit with vitamin A should be used at least every other day. Fruit and vegetable juices may be used;
 - (iv) breads and cereals--four or more servings. Whole grain or enriched breads, cereals, pasta products may be used. Other foods may be added to the meal to provide personal satisfaction, additional nutrition and calories.
 - (3) Water, milk, coffee, tea, and a hot decaffeinated beverage must be available and offered at each meal.
 - (4) Menus used for planning shall specify the size of servings and the anticipated number of each type of meal (regular and modified) to be served.
 - (5) Meals shall be planned and served to provide variety in methods of preparation and content, and shall reflect the seasonal availability of food. At a minimum, the food items within the meat and the vegetable and fruit groups must be different or prepared differently for each day of the week.
 - (6) Each day's menu shall include a hot entree at one meal other than breakfast.
 - (7) Menus shall be prepared and served as planned; occasional substitutions shall be of like nutritional value.
 - (8) Menus shall be:
 - (i) planned a minimum of three weeks in advance; and
 - (ii) recorded on an approved menu planning form.
 - (9) Menus shall be conspicuously posted in a public area accessible to residents and visitors, and shall include any daily changes or substitutions.





- (10) Copies of current menus must be available in the food preparation area.
 - (11) Dated copies of menus, as planned and as served, including any changes or substitutions, shall be kept on file for a period of six months.
- (e) Food purchasing, storage and preparation and service.
- (1) The operator shall comply with regulations relating to food service for sanitation, safety and health, as set forth by the New York State Sanitary Code (10 NYCRR Part 14) and other applicable county and local health codes.
 - (2) In the event that a facility has been inspected by State or local health authorities, a record of such inspection shall be kept on file at the facility for review by the department.
 - (3) Food purchases and preparation shall be based on:
 - (i) planned menus;
 - (ii) tested quantity recipes, adjusted to yield the required number of servings; and
 - (iii) the estimated number of meals to be served.
 - (4) Food on hand shall be sufficient to permit the preparation and service of meals in the event of emergency for a minimum of three days.
 - (5) Food preparation, service and storage areas shall be equipped in accord with standards set forth in section 487.11 of this Part, with the New York State Sanitary Code (10 NYCRR Part 14) and applicable local codes.
 - (6) Food preparation, service and storage equipment shall be maintained in accord with standards set forth by the New York State Sanitary Code (10 NYCRR Part 14), applicable local codes and manufacturers' specifications.
 - (7) Freezer temperatures shall be no warmer than 0µF(-18µC).
 - (8) Storage, preparation and service procedures shall:
 - (i) preserve flavor and appearance of food; and
 - (ii) conserve the nutritive value of food.
 - (9) Storage, preparation and service procedures shall minimize the potential for contamination or spoilage.
 - (10) Food that is adulterated, contaminated or otherwise unfit for human consumption shall not be served.
 - (11) Any food service system other than single-seating table service shall require prior written approval of the department.
 - (12) Tableware appropriate for the meal being served shall be used.
 - (13) Disposable plates and utensils shall not be regularly used for service.
 - (14) No more than 15 hours shall elapse between service of the evening meal and breakfast the next morning.
 - (15) The evening meal shall be served no earlier than 4:30 p.m.

SECTION 487.11 ENVIRONMENTAL STANDARDS

- (a) In order to provide a safe, comfortable environment for residents, the operator shall maintain the facility in a good state of repair and sanitation, and in conformance with applicable State and local laws, regulations and ordinances.
- (b) An operator seeking certification to operate an adult home, or an operator of a certified facility planning renovation or remodeling, must:
- (1) submit to the department, in duplicate, plans and specifications for construction, renovation or building addition; and
 - (2) proceed with implementation of such plans only after obtaining written approval of the department.
- (c) Plans and specifications for construction, renovation or remodeling shall be in compliance with the regulations of the department and any applicable building construction and safety codes.
- (d) After January 1, 1984, a building newly constructed or converted for use as an adult home, or an existing building rehabilitated or renovated for continued use as an adult home in which the cost of any alterations, additions or repairs made within any six-month period exceeds 50 percent of the cost of the replacement of the building at the beginning of that six-month period, shall be in compliance with these regulations and the State Uniform Fire Prevention and Building Code requirements for B-4 occupancy.
- (e) In an existing adult home certified before September 22, 1978, residents may continue to occupy any portion of the third or higher floor in a building of frame or unprotected ordinary construction, or any portion of the seventh or higher floor in a building of protected ordinary construction:
- (1) only until a change of operator occurs; and
 - (2) prior to a change of operator, only if the resident is capable of self-directed, unassisted emergency evacuation.
- (f) Smoke and fire protection.

- (1) A supervised smoke detection system, which is listed by an acceptable testing laboratory, shall be installed in the following locations:
 - (i) in each corridor at least every 40 feet on center, or less if required by the manufacturer;
 - (ii) at the top of all stairways, elevator and hoistway and other unsealed shafts; and
 - (iii) in attics, basements and open floor areas designated for public or resident use, at least one detector for each 1,000 square feet of open or unpartitioned space.
- (2) Notwithstanding paragraph (1) of this subdivision, an unsupervised smoke detection system may continue to be used in a facility certified prior to September 22, 1978, if all components are audible throughout the building.
- (3) There shall be at least one clearly marked, manual, audible pullbox alarm on each occupied floor and wing.
- (4) An automatic sprinkler system shall be installed throughout all buildings of 25 or more beds.
- (5) A building which is at least of noncombustible, protected construction and was certified as an adult home before September 22, 1978 does not need to have a sprinkler system installed.
- (6) At least one of the required fire protection systems shall be connected directly to the local fire department or a central station, unless such a connection is not available. The operator must document that such connection is not available.
- (7) Smoke barriers, including smoke-stop doors of at least one hour fire-resistive rating, shall be installed at the opening of any vertical shaft or stairway. In a stairway between two stories the barrier may be constructed either at the top or bottom of the stairway.
- (8) Required smoke barriers, including smoke-stop doors, shall be:
 - (i) smoketight;
 - (ii) equipped with a self-closing device;
 - (iii) maintained in the closed position unless electromagnetically or electronically connected to the smoke detection systems; and
 - (iv) open in the direction of exit.
- (9) In a facility certified after September 22, 1978, smoke stops are required in all corridors 100 feet long.
- (10) There shall be at least two means of egress from each floor designated for public or resident use.
- (11) The required means of egress shall:
 - (i) be remote from one another;
 - (ii) not pass through a bedroom or bathroom; and
 - (iii) not be obstructed at any time.
- (12) Each required exit door shall be:
 - (i) at least 6 feet 8 inches high;
 - (ii) open in the direction of exit travel;
 - (iii) equipped with panic (quick release) hardware;
 - (iv) equipped with a self-closing device; and
 - (v) freely accessible at all times.
- (13) Any window within 10 feet of an exterior fire stair shall be protected with wire glass, explosion-proof plexiglass, or an exterior screen of half-inch 28-gauge wire mesh.
- (14) Illuminated exit signs shall be installed at each required exit.
- (15) When the exit is not visible, illuminated directional exit signs shall be installed in all corridors to indicate the location of each means of egress.
- (16) Emergency lighting which is listed by an acceptable testing laboratory and powered by battery or an automatic generator shall be installed in all exit hallways, stairwells and public areas.
- (17) Fire extinguishers which meet National Fire Protection Association standards and which are appropriate for the type of fire which may occur at the site of installation shall be:
 - (i) placed at accessible locations on each floor and each wing;
 - (ii) wall-hung; and
 - (iii) properly charged and checked.
- (18) Evacuation procedures which set forth emergency stations, the duties of all staff and residents, and directions for the rapid evacuation of the premises shall be posted in a conspicuous place on each floor and wing.
- (19) The following are fire hazards and are prohibited:
 - (i) smoking in other than designated areas;
 - (ii) portable electric space heaters;





- (iii) self-contained, fuel-burning space heaters;
 - (iv) nonmetal containers for furnace ashes;
 - (v) accumulation of combustible materials in any part of the building;
 - (vi) storage of flammable or combustible liquids in anything other than closed containers listed by an acceptable testing laboratory;
 - (vii) cooking appliances in resident's room; and
 - (viii) overloaded electrical circuits.
- (20) At least one staff member on duty during each shift shall be familiar with the fire alarm systems and procedures for resetting these systems.
- (g) Electrical systems.
- (1) Electrical wiring and equipment shall be maintained and protected to prevent it from becoming a fire hazard or a source of ignition.
 - (2) Electrical wiring and equipment shall be firmly secured to the surface on which it is mounted.
 - (3) Over current protection devices shall be maintained in safe operating condition, shall not be locked or fastened in the "on" position and shall be accessible.
 - (4) Electrical wiring and equipment shall be grounded to provide protection against shock.
 - (5) Flexible cord shall not be run through holes in walls, ceilings or floors; through doorways, windows or similar openings; attached to building surfaces; or concealed behind or under walls, ceiling, floors or floor coverings.
- (h) Safety procedures.
- (1) Access to toilets or bathing areas shall not be through another resident's bedroom.
 - (2) Access to resident bedrooms shall not be through other bedrooms, bathrooms or kitchens.
 - (3) Chain locks, hasps, bars, padlocks and similar devices shall not be used in any resident area in a way which would inhibit access to an exit or the free movement of residents.
 - (4) Doors in residents' sleeping rooms may be secured by the resident, provided such doors can be unlocked from the outside and keys are carried by staff assigned to the floor or wing at all times.
 - (5) Residents shall not have access to storage areas used for medications, cleaning agents, bleaches, insecticides or any other poisonous, dangerous or flammable materials.
 - (6) In a facility certified before October 1, 1978, signal bells, handbells, telephones or other systems audible to staff responsible for that floor or wing shall be available for emergency communication between resident bedrooms and staff stations.
 - (7) In a facility certified after October 1, 1978, a centralized emergency call system shall be installed. In facilities certified after September 1, 1984, the centralized call system shall be installed in all resident bedrooms, toilet areas and bathing areas.
 - (8) All corridors, interior and exterior stairways shall have handrails on both sides.
 - (9) Grab-bars shall be provided for toilets and in bathtubs and showers.
 - (10) Bathtubs and showers shall have nonslip protections.
 - (11) The water temperature at faucets for bathing, showering and handwashing must be capable of attaining a temperature of 95 degrees Fahrenheit (35 degrees Celsius) and must not attain a temperature in excess of 110 degrees Fahrenheit (43 degrees Celsius).
 - (12) Heating pipes and radiators, with which residents may come in contact, shall be shielded to prevent burns.
 - (13) Illumination shall be present at the entrance to each resident bedroom.
 - (14) In a facility certified after September 22, 1978, all rooms in resident-occupied areas, including bedrooms, shall have general lighting switches at the entrance to each room.
 - (15) Night lights shall be provided and working in all hallways, stairways and bathrooms which are not private.
 - (16) A hallway or corridor shall not be used for storage.
 - (17) Throw or scatter rugs shall not be permitted unless equipped with a nonslip backing or secured to the floor.
 - (18) Polishes used on floors shall provide a nonslip finish.
 - (19) The floor area immediately adjacent to a shower or tub shall have a nonslip surface or a nonslip mat.
- (i) Furnishings and equipment.
- (1) The operator shall provide furnishings and equipment which do not endanger resident health, safety and well-being, and which support daily activities and are appropriate to function.
 - (2) All resident areas shall be decorated, painted and appropriately furnished.

- (3) All upholstery materials, carpets and similar floor coverings, installed on or after October 1, 1978, shall be moisture- and soil-resistant, except on furniture provided by the resident and the property of the resident.
- (4) Each operator shall furnish each resident with the following minimum bedroom equipment:
 - (i) a standard single bed, well constructed, in good repair, and equipped with:
 - (a) clean springs maintained in good condition;
 - (b) a clean, comfortable, well-constructed mattress, standard in size for the bed; and
 - (c) a clean comfortable pillow of average bed size.
 - (ii) a chair;
 - (iii) a table;
 - (iv) a lamp;
 - (v) lockable storage facilities, which cannot be removed at will, for personal articles and medications;
 - (vi) individual dresser and closet space for the storage of resident clothing; and
 - (vii) a hinged entry door.
- (5) Rollaway beds, metal cots or folding beds shall not be used.
- (6) Beds with side rails or beds in excess of 36 inches high shall not be used, except in sick bays.
- (7) Each resident shall be supplied with:
 - (i) two sheets;
 - (ii) pillowcase;
 - (iii) at least one blanket;
 - (iv) a bedspread;
 - (v) towels and washcloths;
 - (vi) soap; and
 - (vii) toilet tissue.
- (8) Bed linens, blanket, spreads and towels shall be:
 - (i) clean and washable;
 - (ii) free from rips and tears; and
 - (iii) available when changes are necessary.
- (9) A complete change of bed linens, towels and washcloths shall be provided to each resident at entry, at least once a week, and more often if needed.
- (10) The operator shall maintain a bed linen inventory equal to at least double the average daily census of the facility.
- (11) All windows in resident-occupied areas shall be equipped with curtains, shades or blinds.
- (12) All operable windows shall be equipped with screens.
- (13) Light fixtures shall be shaded.
- (14) Dining areas shall be furnished with dining tables and chairs appropriate to the size and function of the facility.
- (15) Living rooms, sitting rooms, lounges and recreation areas shall be furnished with tables, chairs, lighting fixtures and other equipment appropriate to the size and function of the specific area and of the facility.
- (16) The food preparation and service area shall be provided with sufficient and suitable space and equipment to maintain efficient and sanitary operation of all required functions, in compliance with the New York State Sanitary Code (10 NYCRR Part 14).
- (j) Housekeeping.
 - (1) The operator shall maintain a clean and comfortable environment.
 - (2) All areas of the facility shall be free of vermin and rodents.
 - (3) All areas of the facility, including but not limited to the floors, walls, windows, doors, ceilings, fixtures, equipment and furnishings, shall be clean and free of odors.
 - (4) Blankets, bedspreads, pillows and other furnishings shall be laundered as often as necessary for cleanliness and freedom from odors.
 - (5) It shall be the responsibility of the operator to launder the personal washable clothing of residents at no additional charge. The operator may provide the facilities and supplies for residents who choose to launder their own personal clothing.
- (k) Maintenance.
 - (1) The operator of each facility shall insure the continued maintenance of the facility.





- (2) The building and grounds shall be maintained in a clean, orderly condition and in good repair.
 - (3) All equipment and furnishings shall be maintained in a clean, orderly condition and in good working order.
 - (4) Walls and ceiling coverings shall be free of cracks or tears, peeling wallpaper or paint, missing or cracked tiles.
 - (5) Floors and floor coverings shall be free of cracks and missing or raised portions.
 - (6) Electrical systems, including appliances, cords and switches, shall be maintained in good working order.
 - (7) Plumbing and plumbing fixtures shall be maintained in good working order.
 - (8) Ventilation, air conditioning and air changing systems shall be maintained in good working order.
 - (9) Heating systems shall be maintained in good working order.
 - (10) The facility building, grounds and other buildings on the premises shall be kept free of breeding areas for flies, vermin and rodents.
 - (11) Entrances, exits, steps and outside walkways shall be kept free from ice, snow and other hazards.
 - (12) Windows and screens shall be kept clean and in good repair.
 - (13) Sprinkler systems shall be maintained in good repair and working order.
 - (14) Smoke and fire protection equipment, including fire extinguishers, shall be maintained in accord with manufacturer's specifications.
 - (15) To ensure safe, proper operating conditions, the following systems and equipment must be inspected or tested by a service company at least once every 12 months, or more frequently if required by local codes:
 - (i) smoke detection systems;
 - (ii) fire alarm system;
 - (iii) sprinkler system;
 - (iv) fire extinguishers;
 - (v) heating system;
 - (vi) elevators;
 - (vii) water supply, if other than a municipal system.
 - (16) All inspection certificates required by State or local authorities for buildings, grounds and equipment shall be available for review.
 - (17) In a facility of 25 beds or more certified after September 22, 1978, at least one janitor's closet shall be required. It shall be adequately ventilated to the outside and equipped with a water supply and a janitor's sink.
- (l) Space requirements for adult homes.
- (1) Space in a facility shall be used exclusively for the purposes set forth in this Part. An operator may request prior permission, in writing, to utilize space for other activities. The operator must demonstrate that the proposed use is not incompatible with the facility program, will not be detrimental to residents, and complies with applicable local codes. A request to use resident bedrooms for another purpose must include a request for an equal reduction in the certified capacity of the facility.
 - (2) Every facility shall have space for dining and separate space for leisure.
 - (3) Space leased for administration, sleeping or passage shall not be considered as dining or leisure space.
 - (4) Dining rooms and leisure areas shall be available for use by residents at appropriate times to provide periods of social and diversional individual and group activities.
 - (5) Space provided for dining shall be at least 15 square feet per certified bed.
 - (6) Space provided for leisure shall be at least 20 square feet per certified bed.
 - (7) In a facility with 25 or more beds, leisure areas shall not be confined to a single room.
 - (8) If an operator is unable to satisfy the requirements for dining and leisure space set forth in paragraphs (2), (5) and (6) of this subdivision, the operator may make written request for an exception. At a minimum, the operator shall be required to provide at least 12 square feet per certified bed for dining, and 15 square feet per certified bed for leisure. Actual space requirements will be conditioned by physical layout and subject to onsite review and written department approval.
 - (9) Space shall be provided for administrative activities and records.
 - (10) Space shall be provided for storage of equipment and supplies.
 - (11) The operator shall maintain areas suitable for posting required notices, documents and other written materials in public locations visible to, and accessible to, residents, staff and visitors.
 - (12) The operator shall provide space for residents to meet privately with staff of the facility, visitors or other service providers.
 - (13) Baths and toilet facilities.



- (i) There shall be a minimum of one toilet and one lavatory for each six residents, and a minimum of one tub or shower for each 10 residents.
- (ii) All toilet and bathing areas shall be vented by means of natural or mechanical ventilation to the outside air.
- (iii) All toilet and bathing areas shall be adequately lighted.
- (iv) All toilet and bathing areas shall be properly enclosed and separated by ceiling-high partitions and doors.

(14) Bedrooms.

- (i) All bedrooms shall be:
 - (a) above grade level;
 - (b) adequately lighted; and
 - (c) adequately ventilated.
- (ii) Light and ventilation for bedrooms shall be by means of windows in an outside wall.
- (iii) Bedrooms shall open directly into a route of egress.
- (iv) Bedrooms may not be used as a passageway, corridor or access to other bedrooms.
- (v) In a facility certified after September 22, 1978, bedrooms shall be limited to single or double occupancy.
- (vi) Single bedrooms shall have a minimum floor area of 100 square feet, exclusive of foyer, wardrobe, closets, lockers and toilet rooms.
- (vii) Double bedrooms shall have a minimum floor area of 160 square feet, exclusive of foyer, wardrobe, closets, lockers and toilet rooms.
- (viii) Notwithstanding subparagraph (vi) of this paragraph, any single bedroom in use and approved by the department or the board of social welfare as of September 22, 1978 which:
 - (a) provides a minimum of 85 square feet, exclusive of entrance way and closet space, and is equipped as required by paragraph (i)(4) of this section, may continue to be used;
 - (b) has less than 85 square feet, exclusive of entrance way and closet space, shall no longer be used as a bedroom after a change of operator occurs.
- (ix) Notwithstanding subparagraph (vii) of this paragraph, any double bedroom in use and approved by the department or the board of social welfare as of September 22, 1978 which:
 - (a) provides a minimum of 70 square feet per resident exclusive of entrance way and closet, provides a minimum of 3 feet between beds and is equipped as required by paragraph (i)(4) of this section may continue to be used;
 - (b) has less than 70 square feet per resident, exclusive of entrance way and closet space, shall no longer be used as a double bedroom after a change of operator occurs.
- (x) Not more than two residents shall share a bedroom; however, if a bedroom was used for more than two residents as of September 22, 1978, and such use was approved by the department or the board of social welfare, such bedroom may continue to be used under the conditions set forth in subparagraph (ix) of this paragraph.

(15) All facilities shall, with the cooperation of the telephone company, have at least one telephone available for outside calls for every 40 residents or portion thereof. The operator may impose equivalent charges for use.

(m) Heating.

- (1) The facility shall have a permanently installed heating system capable of maintaining required temperatures.
- (2) When the outside temperature is 65 degrees Fahrenheit (18 degrees Celsius) or less, the inside temperature in resident bedrooms and common areas shall be, at a minimum, 68 degrees Fahrenheit (20 degrees Celsius).
- (3) When the outside temperature exceeds 85 degrees Fahrenheit (30 degrees Celsius) the operator shall:
 - (i) take measures to maintain a comfortable environment;
 - (ii) monitor resident exposure and reactions to heat;
 - (iii) arrange for health care, if needed; and
 - (iv) arrange for the temporary relocation of residents, if needed.



**OFFICIAL COMPILATION OF CODES, RULES AND
REGULATIONS OF THE STATE OF NEW YORK
TITLE 18. DEPARTMENT OF SOCIAL SERVICES
CHAPTER II. REGULATIONS OF THE DEPARTMENT OF SOCIAL
SERVICES
SUBCHAPTER D. ADULT CARE FACILITIES
PART 489. ADULT CARE FACILITIES STANDARDS FOR FAMILY
TYPE HOMES**

SECTION 489.2 DEFINITIONS.

(a) A family type home for adults shall mean an adult care facility established and operated for the purpose of providing long term residential care, room, board and personal care, and/or supervision to four or fewer adult persons unrelated to the operator, hereafter referred to in this Part as home, and in other applicable Parts, as facility.

(b) Unrelated to the operator of a family type home means that the relationship between the operator and the resident is not that of spouse, parent or parent in law, child or stepchild.

SECTION 489.12 ENVIRONMENTAL STANDARDS.

(a) The operator shall maintain the home in a good state of repair and sanitation, free of safety hazards and in conformance with any applicable local or State health and safety laws or regulations.

(b) Unless the operator has received prior written approval from the social services district, space in a family type home for adults must be used only for long term residential care and for family activities. The operator may request approval to utilize space for other activities such as room and board to individuals not in need of personal care and/or supervision, respite care, protective services for adults placements or adult day care.

- (1) To obtain approval to provide room and board to individuals not in need of personal care and/or supervision, the operator must demonstrate:
 - (i) that the proposed use is not incompatible with the family type program; and
 - (ii) that the additional use can be physically accommodated within the home;
- (2) To obtain approval to provide respite care the operator and the social services district must demonstrate:
 - (i) that the proposed use is not incompatible with the family type program;
 - (ii) that the additional use can be physically accommodated within the home;
 - (iii) that the proposed resident meets the admission standards for a family type home as set forth in section 489.7 of this Part;
 - (iv) that the home does not exceed its certified capacity by admitting a temporary resident who requires personal care and/or supervision unless prior approval is granted by the social services district; and
 - (v) that the length of stay for respite care does not exceed 30 days.
- (3) To obtain approval for a protective services for adults placement, the operator and the social services district must demonstrate:
 - (i) that the proposed use is not incompatible with the family type program;
 - (ii) that the additional use can be physically accommodated within the home;
 - (iii) that the client appears to meet the admission standards set forth in section 489.7 of this Part;
 - (iv) that the home does not exceed its certified capacity by admitting a protective services for adults client who requires personal care and/or supervision unless prior approval is granted by the social services district; and
 - (v) that the length of stay does not exceed 30 days.
- (4) To obtain approval for the provision of adult day care, the operator and the social services district must demonstrate:
 - (i) that the proposed use is not incompatible with the family type program;
 - (ii) that the additional use can be physically accommodated within the home; and
 - (iii) that the operator has provided a substantially consistent high level of care to the facility's residents.

(c) An operator may renovate or remodel only after obtaining approval from the local department of social services and meeting the requirements of applicable building and safety codes.

(d) In a building certified for use, in whole or in part, as a family type home for adults on or after September 22, 1978:

- (1) No resident shall occupy any portion of the third or higher floor in a building of frame or unprotected ordinary construction, as defined by the Uniform Fire Prevention and Building Code.
- (2) No resident shall occupy any portion of the seventh or higher floor in a building of protected ordinary construction, as defined by the Uniform Fire Prevention and Building Code.

(e) Mobile homes shall not be used as family type homes without the prior written approval of the department. Such approval shall be granted only if the mobile home is constructed according to article 3 of chapter D of the Uniform Fire Prevention and Building Code and is in compliance with the requirements of this Part and such other fire safety or building standards as the department or the local social services district may require.

(f) Space requirements.

(1) Resident bedrooms:

- (i) all resident bedrooms shall be above grade level, adequately lighted, and adequately ventilated;
- (ii) single bedrooms shall have minimum floor area of 85 square feet exclusive of entrance way, wardrobe and closets;
- (iii) double bedrooms shall have a minimum floor area of 70 square feet per resident, exclusive of entrance way, wardrobe and closets;
- (iv) not more than two residents may share a bedroom;
- (v) notwithstanding subparagraphs (ii), (iii) and (iv) of this paragraph, any single or double bedroom in use in a certified home as of January 31, 1985 may continue to be used.

(2) Bath and toilet facilities:

- (i) there shall be a minimum of one toilet and one lavatory for every six occupants of the home, and a minimum of one tub or shower for every eight occupants of the home. However, any home certified on or before January 31, 1985 may continue to meet the standards of one tub or shower for every 10 occupants of the home;
- (ii) all toilet and bathing areas shall be vented by means of natural or mechanical ventilation to the outside air; and
- (iii) at minimum, a toilet and lavatory shall be located on the same floor as resident bedrooms unless waived in writing by the local department of social services.

(3) Dining and leisure:

- (i) every home shall have a dining area, and an area for leisure activities;
- (ii) dining and leisure areas shall be sufficient in size for the residents and members of the household to engage in eating and recreation activities; and
- (iii) dining and leisure areas shall not be used as sleeping areas.

(g) Furnishings and equipment.

(1) Furnishings and equipment shall be clean, substantially constructed, and in good repair.

(2) The operator shall furnish each resident with the following minimum bedroom equipment:

- (i) a standard, single bed equipped with springs and a single size mattress;
- (ii) a chair, a nightstand, a lamp, and a wastepaper basket;
- (iii) secure storage area for personal articles and medications; and
- (iv) dresser and closet space for the storage of clothing.

(3) Rollaway beds, metal cots, folding beds or beds with side rails or beds in excess of 36 inches high shall not be used.

(4) Resident bedrooms shall be equipped with a hinged door.

(5) Windows in resident bedrooms shall be furnished with shades or blinds, and curtains or drapes.

(6) Light fixtures in resident bedrooms shall be shaded to prevent glare.

(7) Each resident shall be supplied with sheets, a pillow of average bedsize, a pillowcase, two blankets, a bedspread, and towels and washcloths. These items shall be clean, and free from tears and odors.

(8) A complete change of bed linens, towels and washcloths shall be provided to each resident at entry, at least once a week, and whenever changes are necessary.

(9) Dining areas shall be furnished with table(s) and chairs appropriate to the number of persons residing in the home.

(10) Leisure areas shall be furnished with tables, chairs and lighting fixtures appropriate to the number of persons residing in the home.

(11) Each home shall have a working telephone. The operator shall establish a system which permits residents to make telephone calls.





- (12) Windows used for ventilation shall be equipped with screens.
- (13) There shall be a supply of soap and toilet tissue in the bathroom(s) used by residents.
- (h) Housekeeping.
 - (1) The operator shall maintain a clean and comfortable environment.
 - (2) All areas of the home, including but not limited to the floors, walls, windows, doors, ceilings, fixtures, equipment and furnishings shall be clean and free of vermin, rodents, trash and odors.
 - (3) Resident bedrooms, and common dining and leisure areas shall be cleaned at least weekly or more often as needed.
 - (4) Beds shall be made daily and straightened as necessary.
- (i) Laundry.
 - (1) The operator, as part of the basic rate, shall launder and where appropriate, iron residents' clothes.
 - (2) The operator may make available equipment and space for residents who are willing and able to launder and/or iron personal laundry, under supervision if necessary.
- (j) Maintenance.
 - (1) All equipment and appliances shall be clean and in good working order.
 - (2) Walls, ceilings and floors shall be free of cracks, peeling surfaces and missing tiles or raised portions.
 - (3) Electrical, plumbing, air conditioning and heating systems shall be maintained in good working order.
 - (4) The premises shall be kept free of breeding areas for vermin and rodents.
 - (5) Entrances, exits, steps and outside walkways shall be kept free from ice, snow and other hazards.
 - (6) A sufficient number of trash containers with covers shall be available.
- (k) Heating/cooling.
 - (1) The home shall have a permanently installed heating system capable of maintaining required temperatures.
 - (2) When the outside temperature is 65°F (18°C) or less, the inside temperature in resident bedrooms and common areas shall be, at a minimum, 68°F (20°C).
 - (3) When the outside temperature is 85°F (30°C) or more, the operator shall:
 - (i) take measures to maintain a comfortable environment;
 - (ii) monitor resident exposure and reactions to heat;
 - (iii) arrange for health care, if needed; and
 - (iv) arrange for the temporary relocation of residents, if needed.
- (l) Electrical system.
 - (1) Electrical wiring and equipment shall be maintained and protected to prevent it from becoming a fire hazard or a source of ignition for combustible or hazardous substances, materials or devices.
 - (2) Electrical wiring and equipment shall be firmly secured to the surface on which it is mounted.
 - (3) Overcurrent protection devices shall be maintained in safe operating condition, shall not be locked or fastened in the "on" position, and shall be accessible.
 - (4) Electrical wiring and equipment shall be grounded to provide protection against shock.
 - (5) Flexible cord shall not be run through holes in walls, ceilings, or floors; through doorways, windows or similar openings; attached to building surfaces; or concealed behind or under walls, ceilings, floors or floor coverings.
- (m) Safety procedures.
 - (1) Access to toilets or bathing areas shall not be through another resident's private bedroom.
 - (2) Access to resident bedrooms shall not be through other bedrooms or through bathrooms.
 - (3) Chainlocks, hasps, bars, padlocks and similar devices shall not be used in a way which would inhibit access to an exit or the free movement of residents.
 - (4) Doors in residents' sleeping rooms may be secured by the resident provided such doors can be unlocked from the outside and keys are available to the operator or substitute caretaker at all times.
 - (5) Storage of cleaning agents, bleaches, insecticides, or any other poisonous, dangerous or flammable materials shall be accomplished in a manner that assures resident protection.
 - (6) Signal bells, handbells, telephone or other audible system shall be available for emergency communication between resident bedrooms and the operator.
 - (7) Grab bars shall be provided for toilets and in bathtubs and showers unless waived in writing by the local department of social services upon showing by the operator that the needs of the resident population do not require the use of such devices.
 - (8) All bathtubs and showers used by residents shall have a nonskid surface.

- (9) All interior and exterior stairways shall have a handrail.
 - (10) The water temperature at faucets for bathing showering and handwashing shall not exceed 111 °F (43°C).
 - (11) Heating pipes and radiators, with which residents may come in contact, shall be shielded to prevent burns.
 - (12) Illumination shall be present at the entrance to each resident bedroom in order to provide for safe resident entrance.
 - (13) Night lights shall be provided and working in all hallways, stairways and bathrooms which are used by residents.
 - (14) A hallway or corridor shall not be used for storage of equipment.
 - (15) Throw or scatter rugs shall not be permitted unless tacked down or equipped with a nonslip backing.
 - (16) Polishes used on floor shall provide a nonslip finish.
 - (17) The operator shall have available an emergency source of light which does not rely on commercial electric power.
- (n) Smoke and fire protection.
- (1) Acceptable testing laboratory listed smoke detectors shall be installed in the following locations:
 - (i) in a family type home which is multi level:
 - (a) at the top of all stairways;
 - (b) in a bedroom area when such an area is more than 20 feet from the top of the stairs;
 - (ii) in a family type home which is on a single floor, in corridor(s) leading to bedrooms; or
 - (iii) where recommended by the local fire department.
 - (2) An ABC rated fire extinguisher which meets National Fire Protection Association standards shall be installed in the kitchen. The extinguisher shall be properly installed and charged.
 - (3) Building exits shall be free of obstructions at all times.
 - (4) The following practices and equipment are considered fire hazards and are prohibited:
 - (i) smoking in bed;
 - (ii) nonmetal containers for wood or coal ashes;
 - (iii) unsafe accumulation of combustible material in any part of the building;
 - (iv) unsafe storage of flammable materials;
 - (v) overloaded electrical circuits;
 - (vi) hot plates in resident room(s);
 - (vii) self contained, fuel burning space heaters or stoves except that solid fuel burning stoves may be used upon written approval granted by the local department of social services. Approval must be based upon demonstration by the operator that:
 - (a) the installation of the stove and chimney is approved by the local building or fire department;
 - (b) a semi annual inspection of the stove and fuel source is made by the local department of social services or an individual or group approved by the local department of social services to assure proper utilization;
 - (c) a semi annual cleaning of stovepipes and chimney is performed unless an inspection of the fuel source and chimney indicates more frequent cleaning is necessary; and
 - (d) the operator has attended an education program on solid fuel burning stoves, if available;
 - (viii) portable electric space heaters.
 - (5) Fire escapes, if required by local codes, shall be installed and maintained according to those codes.





Olmstead Decision

SUPREME COURT OF THE UNITED STATES

**OLMSTEAD, COMMISSIONER, GEORGIA DEPARTMENT OF HUMAN RESOURCES, ET AL. V. L. C.,
BY ZIMRING, GUARDIAN AD LITEM AND NEXT FRIEND, ET AL.**

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

NO. 98—536. ARGUED APRIL 21, 1999—DECIDED JUNE 22, 1999

In the Americans with Disabilities Act of 1990 (ADA), Congress described the isolation and segregation of individuals with disabilities as a serious and pervasive form of discrimination. 42 U.S.C. § 12101(a)(2), (5). Title II of the ADA, which proscribes discrimination in the provision of public services, specifies, *inter alia*, that no qualified individual with a disability shall, “by reason of such disability,” be excluded from participation in, or be denied the benefits of, a public entity’s services, programs, or activities. §12132. Congress instructed the Attorney General to issue regulations implementing Title II’s discrimination proscription. See §12134(a). One such regulation, known as the “integration regulation,” requires a “public entity [to] administer ... programs ... in the most integrated setting appropriate to the needs of qualified individuals with disabilities.” 28 CFR § 35.130(d). A further prescription, here called the “reasonable-modifications regulation,” requires public entities to “make reasonable modifications” to avoid “discrimination on the basis of disability,” but does not require measures that would “fundamentally alter” the nature of the entity’s programs. §35.130(b)(7).

Respondents L. C. and E. W. are mentally retarded women; L. C. has also been diagnosed with schizophrenia, and E. W., with a personality disorder. Both women were voluntarily admitted to Georgia Regional Hospital at Atlanta (GRH), where they were confined for treatment in a psychiatric unit. Although their treatment professionals eventually concluded that each of the women could be cared for appropriately in a community-based program, the women remained institutionalized at GRH. Seeking placement in community care, L. C. filed this suit against petitioner state officials (collectively, the State) under 42 U.S.C. § 1983 and Title II. She alleged that the State violated Title II in failing to place her in a community-based program once her treating professionals determined that such placement was appropriate. E. W. intervened, stating an identical claim. The District Court granted partial summary judgment for the women, ordering their placement in an appropriate community-based treatment program. The court rejected the State’s argument that inadequate funding, not discrimination against L. C. and E. W. “by reason of [their] disabilit[ies],” accounted for their retention at GRH. Under Title II, the court concluded, unnecessary institutional segregation constitutes discrimination *per se*, which cannot be justified by a lack of funding. The court also rejected the State’s defense that requiring immediate transfers in such cases would “fundamentally alter” the State’s programs. The Eleventh Circuit affirmed the District Court’s judgment, but remanded for reassessment of the State’s cost-based defense. The District Court had left virtually no room for such a defense. The appeals court read the statute and regulations to allow the defense, but only in tightly limited circumstances. Accordingly, the Eleventh Circuit instructed the District Court to consider, as a key factor, whether the additional cost for treatment of L. C. and E. W. in community-based care would be unreasonable given the demands of the State’s mental health budget.

Held: The judgment is affirmed in part and vacated in part, and the case is remanded.

138 F.3d 893, affirmed in part, vacated in part, and remanded.



Justice Ginsburg delivered the opinion of the Court with respect to Parts I, II, and III—A, concluding that, under Title II of the ADA, States are required to place persons with mental disabilities in community settings rather than in institutions when the State's treatment professionals have determined that community placement is appropriate, the transfer from institutional care to a less restrictive setting is not opposed by the affected individual, and the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities. Pp. 11—18.

(a) The integration and reasonable-modifications regulations issued by the Attorney General rest on two key determinations: (1) Unjustified placement or retention of persons in institutions severely limits their exposure to the outside community, and therefore constitutes a form of discrimination based on disability prohibited by Title II, and (2) qualifying their obligation to avoid unjustified isolation of individuals with disabilities, States can resist modifications that would fundamentally alter the nature of their services and programs. The Eleventh Circuit essentially upheld the Attorney General's construction of the ADA. This Court affirms the Court of Appeals decision in substantial part. Pp. 11—12.

(b) Undue institutionalization qualifies as discrimination "by reason of ... disability." The Department of Justice has consistently advocated that it does. Because the Department is the agency directed by Congress to issue Title II regulations, its views warrant respect. This Court need not inquire whether the degree of deference described in *Chevron U.S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844, is in order; the well-reasoned views of the agencies implementing a statute constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. E.g., *Bragdon v. Abbott*, 524 U.S. 624, 642. According to the State, L. C. and E. W. encountered no discrimination "by reason of" their disabilities because they were not denied community placement on account of those disabilities, nor were they subjected to "discrimination," for they identified no comparison class of similarly situated individuals given preferential treatment. In rejecting these positions, the Court recognizes that Congress had a more comprehensive view of the concept of discrimination advanced in the ADA. The ADA stepped up earlier efforts in the Developmentally Disabled Assistance and Bill of Rights Act and the Rehabilitation Act of 1973 to secure opportunities for people with developmental disabilities to enjoy the benefits of community living. The ADA both requires all public entities to refrain from discrimination, see §12132, and specifically identifies unjustified "segregation" of persons with disabilities as a "for[m] of discrimination," see §§12101(a)(2), 12101(a)(5). The identification of unjustified segregation as discrimination reflects two evident judgments: Institutional placement of persons who can handle and benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life, cf., e.g., *Allen v. Wright*, 468 U.S. 737, 755; and institutional confinement severely diminishes individuals' everyday life activities. Dissimilar treatment correspondingly exists in this key respect: In order to receive needed medical services, persons with mental disabilities must, because of those disabilities, relinquish participation in community life they could enjoy given reasonable accommodations, while persons without mental disabilities can receive the medical services they need without similar sacrifice. The State correctly uses the past tense to frame its argument that, despite Congress' ADA findings, the Medicaid statute "reflected" a congressional policy preference for institutional treatment over treatment in the community. Since 1981, Medicaid has in fact provided funding for state-run home and community-based care through a waiver program. This Court emphasizes that nothing in the ADA or its implementing regulations condones termination of institutional settings for persons unable to handle or benefit from community settings. Nor is there any federal requirement that community-based treatment be imposed on patients who do not desire it. In this case, however, it is not genuinely disputed that L. C. and E. W. are individuals "qualified" for noninstitutional care: The State's own professionals determined that community-based treatment would be appropriate for L. C. and E. W., and neither woman opposed such treatment. Pp. 12—18.

Justice Ginsburg, joined by Justice O'Connor, Justice Souter, and Justice Breyer, concluded in Part III—B that the State's responsibility, once it provides community-based treatment to qualified persons with disabilities, is not boundless. The reasonable-modifications regulation speaks of "reasonable modifications" to avoid discrimination, and allows States to resist modifications that entail a "fundamenta[l] alter[ation]" of the States' services and programs. If, as the Eleventh Circuit indicated, the expense entailed in placing one or two people in a community-based treatment program is properly measured for reasonableness against the State's entire mental health budget, it is unlikely that a State, relying on the fundamental-alteration defense, could ever prevail. Sensibly construed, the fundamental-alteration component of the reasonable-modifications regulation would allow the State to show that, in the allocation of available resources, immediate relief for the plaintiffs would be inequitable, given the responsibility the State has undertaken for the care and treatment of a large and diverse population of persons with mental disabilities. The ADA is not reasonably read to impel States to phase out institutions, placing patients in need of close care at risk. Nor is it the ADA's mission to drive States to move institutionalized patients into an inappropriate setting, such as a homeless shelter, a placement the State proposed, then retracted, for E. W. Some individuals, like L. C. and E. W. in prior years, may need institutional care from time to time to stabilize acute psychiatric symptoms. For others, no placement outside the institution may ever be appropriate. To maintain a range of facilities and to administer services with an even hand, the State must have more leeway than the courts below understood the fundamental-alteration defense to allow. If, for example, the State were to demonstrate that it had a comprehensive, effectively working plan for placing qualified persons with mental disabilities in less restrictive settings, and a waiting list that moved at a reasonable pace not controlled by the State's endeavors to keep its institutions fully populated, the reasonable-modifications standard would be met. In such circumstances, a court would have no warrant effectively to order displacement of persons at the top of the community-based treatment waiting list by individuals lower down who commenced civil actions. The case is remanded



for further consideration of the appropriate relief, given the range of the State's facilities for the care of persons with diverse mental disabilities, and its obligation to administer services with an even hand. Pp. 18—22.

Justice Stevens would affirm the judgment of the Court of Appeals, but because there are not five votes for that disposition, joined Justice Ginsburg's judgment and Parts I, II, and III—A of her opinion. Pp. 1—2.

Justice Kennedy concluded that the case must be remanded for a determination of the questions the Court poses and for a determination whether respondents can show a violation of 42 U.S.C. § 12132's ban on discrimination based on the summary judgment materials on file or any further pleadings and materials properly allowed. On the ordinary interpretation and meaning of the term, one who alleges discrimination must show that she received differential treatment vis-à-vis members of a different group on the basis of a statutorily described characteristic. Thus, respondents could demonstrate discrimination by showing that Georgia (i) provides treatment to individuals suffering from medical problems of comparable seriousness, (ii) as a general matter, does so in the most integrated setting appropriate for the treatment of those problems (taking medical and other practical considerations into account), but (iii) without adequate justification, fails to do so for a group of mentally disabled persons (treating them instead in separate, locked institutional facilities). This inquiry would not be simple. Comparisons of different medical conditions and the corresponding treatment regimens might be difficult, as would be assessments of the degree of integration of various settings in which medical treatment is offered. Thus far, respondents have identified no class of similarly situated individuals, let alone shown them to have been given preferential treatment. Without additional information, the Court cannot address the issue in the way the statute demands. As a consequence, the partial summary judgment granted respondents ought not to be sustained. In addition, it was error in the earlier proceedings to restrict the relevance and force of the State's evidence regarding the comparative costs of treatment. The State is entitled to wide discretion in adopting its own systems of cost analysis, and, if it chooses, to allocate health care resources based on fixed and overhead costs for whole institutions and programs. The lower courts should determine in the first instance whether a statutory violation is sufficiently alleged and supported in respondents' summary judgment materials and, if not, whether they should be given leave to replead and to introduce evidence and argument along the lines suggested. Pp. 1—10.

Ginsburg, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, and III—A, in which Stevens, O'Connor, Souter, and Breyer, JJ., joined, and an opinion with respect to Part III—B, in which O'Connor, Souter, and Breyer, JJ., joined. Stevens, J., filed an opinion concurring in part and concurring in the judgment. Kennedy, J., filed an opinion concurring in the judgment, in which Breyer, J., joined as to Part I. Thomas, J., filed a dissenting opinion, in which Rehnquist, C. J., and Scalia, J., joined.

Legal Resources

TO FIND LAWS:

FindLaw.com

Web: <http://www.findlaw.com/casecode/>

Centers for Medicare & Medicaid Services

Web: <http://www.cms.hhs.gov/regulations/>

SPECIFIC LAWS:

Article 27-F of the NYS Public Health Law

Web:

http://www.wadsworth.org/labcert/regaffairs/clinical/27-F_1_99.pdf#search='27f%20public%20health%20law'

Federal Civil Rights Act

Web: <http://usinfo.state.gov/usa/infousa/laws/majorlaw/civilr19.htm>

HIPAA

General Information:

Tel: 866 627-7748.

Web: <http://www.hhs.gov/ocr/hipaa/>

Text: <http://aspe.hhs.gov/admsimp/pl104191.htm>

Federal Nursing Home Reform Act from the Omnibus Budget Reconciliation Act of 1987 (OBRA '87)

Web: http://www.litcombudsman.org/ombpublic/49_346_1023.cfm

Older Americans Act

Web: http://www.aoa.dhhs.gov/about/legbudg/oa/legbudg_oaa.asp

Section 504 of the Federal Rehabilitation Act

Web: <http://www.hhs.gov/ocr/504.html>

Social Security Act

Web: http://www.ssa.gov/OP_Home/ssact/comp-toc.htm





Medicare

Web: <http://www.medicare.gov/>

Medicaid

Web: <http://www.cms.hhs.gov/medicaid/>

NYS Mental Hygiene Law Article 81

Web: <http://caselaw.lp.findlaw.com/nycodes/c62/a28.html>

