

101 CMR: EXECUTIVE OFFICE OF HEALTH AND HUMAN SERVICES

101 CMR 30.00: STATEWIDE LONG-TERM CARE OMBUDSMAN PROGRAM

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30.01: Scope and Purpose

101 CMR 30.00 sets forth the requirements to establish an independent statewide long-term care ombudsman program within the Executive Office of Health and Human Services pursuant to M.G.L. c. 6A, §16CC. 101 CMR 30.00 includes the requirements for the Ombudsman Program to receive and investigate complaints from residents of long-term care facilities and assisted living residences, or their resident representative, regarding the health, safety, welfare, or quality of life of the residents, and to resolve those complaints through negotiation and mediation or by referral to an appropriate agency or organization. 101 CMR 30.00 also establishes criteria and procedures to designate local ombudsman programs and to certify ombudsman representatives to carry out the duties of the Ombudsman Program.

30.02: Definitions

As used in 101 CMR 30.00, unless the context requires otherwise, these terms will have the following meanings.

Access. The authority of an ombudsman representative to enter any facility to:

- (1) perform the actions and duties of the Ombudsman Program as set forth in 101 CMR 30.00;
- (2) meet with residents to obtain permission to conduct an investigation of a complaint;
- (3) obtain the name and contact information of all resident representatives;
- (4) review medical, social, and other relevant records with the consent of the resident or the resident representative; or

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(5) with the consent and approval of the State Ombudsman, review medical, social, and other records of a resident who is unable to give informed consent and has no resident representative.

Area Agency on Aging (AAA). A public agency or nonprofit organization designated by the Executive Office of Elder Affairs (EOEA) in a planning and service area under the Older Americans Act, 42 U.S.C. 3025, which is responsible for developing and administering an area plan as defined under 42 U.S.C. 3026.

Case. An inquiry brought to or initiated by the State Ombudsman or ombudsman representative on behalf of a resident or group of residents. A case includes the complaint, or multiple related complaints, the Ombudsman Program investigation, strategy for resolution, and related records.

Certification. The process by which a person associated with a local ombudsman program, or the Statewide Long-term Care Ombudsman Program, who after completing the training and other criteria set forth in 101 CMR 30.09, now qualifies to be certified and designated by the State Ombudsman to be an ombudsman representative.

Complainant. A resident, resident representative, or an individual, organization, or government agency, including the State Ombudsman or ombudsman representative, who files or initiates a complaint with the Ombudsman Program.

Complaint. A concern brought to, or initiated by, the State Ombudsman or an ombudsman representative for investigation and action on behalf of one or more residents relating to the health, safety, welfare, rights, or quality of life of one or more residents, including the failure of a facility, organization, or government agency to comply with governing statutes or regulations.

Conflict of Interest. A situation where an interest may intrude upon, interfere with, threaten to negate, or give the appearance of interfering with or undermining the impartiality of a person and their ability to act without compromise due to competing duties or obligations. A conflict of interest includes an individual or organizational conflict of interest as set forth in 101 CMR 30.16(1) and (2).

EOHHS. The Executive Office of Health and Human Services established under M.G.L. c. 6A.

EOEA. The Massachusetts Executive Office of Elder Affairs established under M.G.L. c. 19A.

Facility. A long-term care facility subject to licensure by the Massachusetts Department of Public Health pursuant to M.G.L. c. 111, § 71 or 42 U.S.C. 3001 *et seq.*, or an assisted living residence certified by the Executive Office of Elder Affairs pursuant to M.G.L. c. 19D.

Facility Administrator. A person:

(1) who is licensed under M.G.L. c. 112, §§ 108 through 117 to administer, manage, supervise, or have general administrative charge of a long-term care facility, whether or not such individual has an ownership interest in such entity and whether his or her functions and duties are shared with one or more individuals, or a suitable and responsible person who

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administers, manages, supervises, or is in general administrative charge of a rest home as further defined in 105 CMR 150.002: *Standards for Long-term Care Facilities*; or
(2) who has general administrative charge of an assisted living residence certified pursuant to M.G.L. c. 19D and 651 CMR 12.00: *Certification Procedures and Standards for Assisted Living Residences*.

Host Agency. An agency designated by the State Ombudsman to house and support a local ombudsman program for a specific geographic area. Only an AAA, a public agency, or a nonprofit organization may be designated as a host agency.

Informed Consent. The process of informing a resident of the risks and benefits associated with certain actions and decisions that results in the resident's authorization or agreement to proceed. For purposes of 101 CMR 30.00, informed consent should be confirmed in writing, including through the use of auxiliary aids and services as necessary. If written consent is not possible, consent may be obtained orally or visually, including through the use of auxiliary aids and services, provided such consent is documented contemporaneously.

Local Ombudsman Program. A program operating in a designated host agency to carry out the functions of the Ombudsman Program for an assigned geographic area. A local ombudsman program comprises a local ombudsman program director and ombudsman representatives employed by or associated with the host agency and designated and certified by the State Ombudsman to act as ombudsman representatives in that geographic area.

Local Ombudsman Program Director (also known as a Local Program Director). An individual employed by or associated with a local ombudsman program as the director with the responsibility for the operation of a local ombudsman program and who is certified and designated as such by the State Ombudsman pursuant to M.G.L. c. 6A, § 16CC, and 101 CMR 30.09(1).

Ombudsman Representative. An employee or volunteer of the Ombudsman Program or a local ombudsman program, who has been certified and designated by the State Ombudsman to act as a representative of the Ombudsman Program.

Resident. A person who is receiving treatment or care in a facility, including, but not limited to, application or admission, retention, confinement, commitment, period of residence, transfer, discharge, and instances directly related to such status.

Resident Representative.

- (1) An individual chosen by the resident to act on the resident's behalf to support the resident in decision-making: access the resident's medical, social, or other personal information; manage financial matters; or receive notifications;
- (2) A person authorized by state or federal law including, but not limited to, agents under power of attorney, health care proxy, representative payees, and other fiduciaries, to act on behalf of the resident in order to support the resident in decision-making: access the resident's medical, social, or other personal information; manage financial matters; or receive notifications;

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- (3) A legal representative, as used in section 712 of the Older Americans Act; or
- (4) The court-appointed guardian or conservator of the resident.
- (5) Nothing in this regulation is intended to expand the scope of authority of a resident representative beyond the authority specifically authorized by the resident, state or federal law, or a court of competent jurisdiction.

State Long-term Care Ombudsman (also referred to as State Ombudsman). An individual appointed by the Secretary of EOHHS pursuant to M.G.L. c. 6A, § 16CC(b) and in accordance with 42 U.S.C. 3001, *et seq.*, to direct the Statewide Long-term Care Ombudsman Program.

Statewide Long-term Care Ombudsman Program (also referred to as the Ombudsman Program). The statewide ombudsman program established by EOHHS for the purpose of advocating on behalf of residents, operated separately and independently from EOHHS, and directed by the State Ombudsman pursuant to M.G.L. c. 6A, § 16CC, and in accordance with 42 U.S.C. 3001 *et seq.* The State Ombudsman Program includes the local ombudsman programs.

Willful Interference. The actions or inactions taken by an individual in an attempt to intentionally prevent, interfere with, or attempt to impede the State Ombudsman or an ombudsman representative from performing the functions or responsibilities of the Ombudsman Program.

30.03: Establishment of the Statewide Long-term Care Ombudsman Program

- (1) The Secretary of EOHHS will, subject to appropriation or the receipt of federal funds, establish either directly or by contract, an independent statewide long-term care ombudsman program and appoint a State Ombudsman.
- (2) EOHHS will ensure the State Ombudsman serves on a full-time basis, and that the functions, responsibilities, and duties set forth in 101 CMR 30.05 comprise the entirety of the State Ombudsman's work.
- (3) EOHHS will further ensure the State Ombudsman meets minimum qualifications, which will include, but not be limited to, demonstrated expertise in:
 - (a) long-term services and supports or other direct services for older persons or individuals with disabilities;
 - (b) consumer-oriented public policy advocacy;
 - (c) leadership and program management skills; and
 - (d) negotiation and problem resolution skills.
- (4) The State Ombudsman will establish policies and procedures, in consultation with EOHHS, to carry out the Ombudsman Program in accordance with 42 U.S.C. 3001 *et seq.*, M.G.L. c. 6, § 16CC, and associated federal and state regulations.

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30.04: Responsibilities of Agency in the Administration of the Ombudsman Program

EOHHS, as the state agency responsible for establishing and assessing the independent Ombudsman Program, will:

- (1) ensure the State Ombudsman complies with all relevant provisions of 42 U.S.C. 3001 *et seq*, and associated regulations, including 42 U.S.C. 3058g, 45 CFR §§ 1321 and 1324, and M.G.L. c. 6, § 16CC;
- (2) ensure the Ombudsman Program has sufficient authority and access to facilities, residents, and information needed to fully perform all the functions, responsibilities, and duties of the Ombudsman Program;
- (3) provide training opportunities, or ensure such opportunities are available, for the State Ombudsman and ombudsman representatives, to maintain expertise to serve as effective advocates for residents;
- (4) provide personnel supervision and management for the State Ombudsman and ombudsman representatives who are employees of EOHHS. Such management will include an assessment of whether the Ombudsman Program is performing all of its functions under 42 U.S.C. 3001 *et seq*, and associated regulations, as well as M.G.L. c. 6, § 16CC;
- (5) monitor the Ombudsman Program for quality and effectiveness, as required by 45 CFR § 1321.11(b). Such monitoring will include fiscal monitoring and an assessment of whether the Ombudsman Program is performing all functions, responsibilities, and duties set forth in 45 CFR §§ 1324.13 and 1324.19. EOHHS may make reasonable requests for reports, including aggregated data regarding Ombudsman Program activities, to meet the requirements of this provision;
- (6) ensure the files, records, or other information maintained by the Ombudsman Program are protected from disclosure consistent with the limitations set forth in 101 CMR 30.15, 45 CFR §§ 1324.11(e)(3), and 1324.13(e);
- (7) integrate the goals and objectives of the Ombudsman Program into the state plan and coordinate the goals and objectives of the Ombudsman Program with those of other programs established under Title VII of the Older Americans Act and other state elder rights, disability rights, and elder justice programs, to promote collaborative efforts and diminish duplicative efforts;
- (8) provide elder rights leadership, including by requiring the coordination of Ombudsman Program services with the activities of other elder rights programs with responsibilities relevant to the health, safety, wellbeing, or rights of older adults, including residents, as set forth in 45 CFR § 1324.13(h);
- (9) provide mechanisms to prohibit and investigate allegations of willful interference, retaliation, and reprisals

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- (a) by a facility, other entity, or individual with respect to a resident, complainant, employee, or other person for filing a complaint with, providing information to, or otherwise cooperating with any representative of the Ombudsman Program; or
 - (b) by a facility, other entity, or individual against the State Ombudsman or ombudsman representatives while fulfilling their functions, responsibilities, or duties;
- (10) provide for appropriate sanctions with respect to interference, retaliation, and reprisals;
- (11) ensure legal counsel for the Ombudsman Program is adequate, available, has competencies relevant to the legal needs of the Ombudsman Program and residents, and is without conflict of interest; and
- (12) require the State Ombudsman to maintain complete records of complaints, actions, findings, and recommendations.

30.05: Functions and Responsibilities of the State Long-term Care Ombudsman

- (1) The State Ombudsman is responsible for leading and managing the Statewide Long-term Care Ombudsman Program as follows.
- (a) Functions. The State Ombudsman will, directly or through ombudsman representatives:
 1. identify, investigate, and resolve complaints that
 - a. are made by, or on behalf of, residents; and
 - b. relate to action, inaction, or decisions by facilities or their staff, public agencies, or health and social service agencies that may adversely affect the health, safety, welfare, or rights of residents;
 2. provide services to protect the health, safety, welfare, and rights of residents;
 3. inform residents how to obtain services provided by the Ombudsman Program;
 4. ensure residents have regular and timely access to the services provided through the Ombudsman Program, and that residents and complainants receive timely responses to requests for information and complaints from the Ombudsman Program;
 5. ensure ombudsman representatives visit residents at one or more facility within the assigned geographic area at least once every other week, at a time which best meets the needs of the Ombudsman Program and residents, to ensure regular and timely access to Ombudsman Program services;
 6. represent the interests of residents before governmental agencies and ensure that individual residents have access to administrative, legal, and other remedies to protect the health, safety, welfare, and rights of residents;
 7. provide administrative and technical assistance to ombudsman representatives, host agencies, and local ombudsman programs;
 8. analyze, comment on, and monitor the development of laws, regulations, policies, and actions to protect the health, safety, welfare, and rights of residents as set forth in 45 CFR 1324.13(a)(7);
 9. provide information and recommendations to public and private agencies, legislators, the media, and other persons regarding problems and concerns relating to residents and the conditions of facilities;

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10. investigate all allegations of interference, retaliation, and reprisal by an entity against a resident, complainant, ombudsman representative, the State Ombudsman, and the Ombudsman Program; and
 11. establish state level coordination with other programs, agencies, and entities with responsibilities relevant to the protection of the health, safety, welfare, or rights of residents as set forth in 45 CFR 1324.13(h).
- (b) Designation and Certification. The State Ombudsman will determine designation, and refusal, suspension, or removal of designation, of local ombudsman programs and certification of ombudsman representatives.
1. Local Ombudsman Programs. Where the State Ombudsman chooses to designate local ombudsman programs, the State Ombudsman will:
 - a. require as a condition of designation that the local ombudsman program be organizationally located within a public agency or nonprofit organization;
 - b. review and approve plans or contracts governing local ombudsman programs in coordination with EOHHS; and
 - c. monitor, on a regular basis, the performance of the local ombudsman program.
 2. The State Ombudsman will establish certification requirements for ombudsman representatives, consistent with the requirements of 45 CFR 1324.13(c), including training and continuing education requirements.
 3. The State Ombudsman will investigate allegations of misconduct by ombudsman representatives in the performance of Ombudsman Program duties and coordinate such investigations with EOHHS, the local ombudsman program, and the host agency, as applicable.
- (c) Ombudsman Program Records. The State Ombudsman will manage the Ombudsman Program records consistent with 101 CMR 30.15 and maintain a statewide uniform reporting system to collect and analyze data relating to complaints and conditions in facilities for the purpose of identifying and resolving complaints.
- (d) Fiscal Management. The State Ombudsman will determine the use of fiscal resources appropriated or otherwise available for the operation of the Ombudsman Program. The State Ombudsman will establish financial and administrative systems and procedures that comply with federal and state laws and requirements, including, but not limited to, approving all budgets and expenditures of the Ombudsman Program and the local ombudsman programs as set forth in 45 CFR 1324.13(f).
- (e) Annual Report. The State Ombudsman will independently develop and provide final approval of an annual report as set forth in M.G.L. c. 6, § 16CC(g)(v) and 45 CFR 1324.13(g), or as directed by the Secretary or other federal requirement.

30.06: Functions and Responsibilities of Host Agencies for Local Ombudsman Programs

The responsibilities of a host agency will include, but not be limited to, the following:

- (1) recruit and retain sufficient staff to serve as ombudsman representatives within an assigned geographic area;
- (2) coordinate with the State Ombudsman Program regarding certification requirements for qualification as an ombudsman representative;

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- (3) provide personnel management, but not the programmatic oversight, of ombudsman representatives associated with the local ombudsman program, including employee and volunteer representatives;
- (4) ensure personnel policies and practices do not prohibit ombudsman representatives from performing the duties of, or from adhering to, the access, confidentiality, and disclosure requirements of the Ombudsman Program;
- (5) ensure ombudsman representatives have the capacity to receive, investigate, and resolve complaints;
- (6) retain complete records for the local ombudsman program;
- (7) comply with confidentiality requirements set forth in 101 CMR 30.15, M.G.L. c. 6, § 16CC, and 42 U.S.C. 3001 *et seq.*;
- (8) publicize the existence and function of the local ombudsman program and the Statewide Long-term Care Ombudsman Program;
- (9) ensure an ombudsman representative has appropriate Ombudsman Program identification;
- (10) establish financial and administrative systems and procedures that comply with the provisions contained in 45 CFR 74 (Administration of Grants) Sub-part H (Standards for Grantee and Sub-grantee Financial Management Systems), as well as requirements developed by EOHHS, the State Ombudsman, and the federal government; and
- (11) comply with regulations and policies developed by the State Ombudsman and carry out all other activities consistent with the requirements of M.G.L. c. 6A, § 16CC and 42 U.S.C. 3001 *et seq.*

30.07: Designation of Local Ombudsman Programs

- (1) The State Ombudsman designates host agencies to house a local ombudsman program for a geographic area. Host agency designation occurs on an annual cycle determined by the State Ombudsman, for a period not to exceed one year. Designation may be renewed at the discretion of the State Ombudsman. Only AAAs, public agencies, or nonprofit organizations may be designated to host local ombudsman programs.
- (2) To be designated as a host agency for a local ombudsman program, the host agency must have the ability and capacity to carry out the functions of a local ombudsman program as set forth in 101 CMR 30.06, 101 CMR 30.07, and 45 CFR 1324.19. The State Ombudsman may not designate as a host agency:
 - (a) an agency or organization responsible for licensing or certifying facilities;
 - (b) associations of facilities or their affiliates or agents; or
 - (c) any other entity for which such designation would create a conflict of interest as a local ombudsman program.

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(3) The local ombudsman program and the ombudsman representatives must be designated by the State Ombudsman to be permitted access to residents for the purposes of performing the duties of the Ombudsman Program.

(4) Annual Designation Procedures.

(a) On an annual basis, the State Ombudsman will evaluate prospective or existing host agencies for designation.

(b) The State Ombudsman will review the application of a host agency to house a local ombudsman program to ensure:

1. the host agency has the capacity to comply with the Ombudsman Program rules and requirements and applicable state and federal laws and regulations, including the agency's ability to recruit sufficient ombudsman representatives to meet the coverage requirements for the assigned geographic area and otherwise meet the requirements of 101 CMR 30.06, 101 CMR 30.07, and 45 CFR 1324.19; and
2. the designation does not create or involve a conflict of interest.

(5) Funding and Designation. EOEAs provide the funding for a local ombudsman program to the AAAs who distribute the funds to designated host agencies housing local ombudsman programs.

(6) Ombudsman Program Geographic Areas. The State Ombudsman will designate local ombudsman programs sufficient to provide Ombudsman Program services in all geographic areas of the Commonwealth.

30.08: Refusal, Suspension, or Removal of Local Ombudsman Program Designation

(1) The State Ombudsman may refuse to designate a host agency during the application process, or suspend or remove designation of a host agency, if the State Ombudsman determines the local ombudsman program does not meet the standards set forth in 101 CMR 30.06 or 101 CMR 30.07, or is not in compliance with the designation agreement or other federal or state laws or requirements to operate as a local ombudsman program.

(a) To effectuate the de-designation determination, the State Ombudsman will send written notice by first class mail of such determination to the host agency, with copy to the appropriate AAA, containing the information required in 101 CMR 30.08(3).

(b) The effective date of the de-designation determination must be at least 15 calendar days after the issue date of written notice, except in emergency situations as set forth in 101 CMR 30.08(2).

(c) The de-designated host agency will have the opportunity to request that the State Ombudsman reconsider the determination.

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(2) If the State Ombudsman determines an action or omission by a person associated with a local ombudsman program endangers or has endangered the life, health, welfare, or safety of a resident or staff of a facility, the State Ombudsman may refuse, suspend, or remove the host agency's designation orally, effective immediately. The State Ombudsman will provide written notice of action with the information required in 101 CMR 30.08(3) to the host agency within seven calendar days of the oral notice.

(3) Notice of Action. The written notice of a determination by the State Ombudsman to refuse, suspend, or remove designation of the host agency must:

- (a) state the grounds for the State Ombudsman's determination;
- (b) include the termination date of the designation; and
- (c) inform the host agency of the right to apply to the State Ombudsman for reconsideration of the determination within 15 calendar days of the effective date of the notice of the termination of designation.

(4) Continuity of Services. Upon refusal, suspension, or removal of designation, the State Ombudsman will work to ensure no gap in Ombudsman Program services and designate a new local ombudsman program for the geographic area as soon as practicable.

(5) Termination of Funding of a Designated Local Ombudsman Program.

- (a) The funding to the local ombudsman program for the balance of the funding period will immediately terminate after refusal to redesignate or the de-designation of a local ombudsman program by the State Ombudsman.
- (b) The local ombudsman program may appeal to the Secretary of EOHHS, or their designee, the termination of funding.
 1. The appeal must be submitted to the Secretary of EOHHS within 15 calendar days of the effective date of the termination of funding.
 2. The Secretary, or their designee, will make a decision on the appeal within 30 days of receipt of the appeal.
 3. The decision of the Secretary, or their designee, regarding the termination of funding will be the final agency decision.

30.09: Certification of Local Ombudsman Program Directors and Ombudsman Representatives

(1) Local Ombudsman Program Directors.

- (a) No person will serve as the director of a local ombudsman program, by employment or association, until they are certified, or temporarily certified as a trainee, by the State Ombudsman. The State Ombudsman may refuse, suspend, or remove such certification of a local ombudsman program director.
- (b) Certification Requirements. To be certified by the State Ombudsman, a local ombudsman program director must, at a minimum:
 1. meet the qualifications of a local ombudsman program director established by the State Ombudsman;
 2. satisfactorily complete an ombudsman basic training program conducted by the State Ombudsman as set forth in 101 CMR 30.10;

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3. attend on a regular basis the State Ombudsman-sponsored director training or meeting sessions;
4. comply with all laws, regulations, policies, and procedures governing the Ombudsman Program; and
5. provide assurances and, if requested, documentation that they have no conflict of interest with the Ombudsman Program.

(c) De-certification. After receiving certification to serve as a director, the local ombudsman program director will remain certified until:

1. the State Ombudsman de-designates the local ombudsman program where the individual serves as director;
2. the local ombudsman program director is no longer employed as director or associated with a local ombudsman program; or
3. the local ombudsman program director receives a written notice of suspension or removal of certification from the State Ombudsman citing a material failure to comply with one or more of the certification requirements stated in 101 CMR 30.09(1), or fails to perform all required duties of the director of the local ombudsman program.

(2) Ombudsman Representatives.

(a) No person will serve as an ombudsman representative, by employment or association, unless they are certified by the State Ombudsman. The State Ombudsman may refuse, suspend, or remove such certification of an ombudsman representative.

(b) Certification Requirements. To be certified by the State Ombudsman, the ombudsman representative must, at a minimum:

1. satisfactorily complete an ombudsman basic training program authorized by the State Ombudsman as set forth in 101 CMR 30.10;
2. comply with all relevant laws, regulations, policies, and procedures; and
3. provide assurances and, if requested, documentation that they have no conflict of interest with the Ombudsman Program.

(c) De-certification Requirements. After receiving certification, an ombudsman representative will remain certified until

1. the State Ombudsman de-designates the local ombudsman program with which the ombudsman representative is associated;
2. the ombudsman representative is no longer employed or associated with a local ombudsman program; or
3. the ombudsman representative receives a written notice of suspension or removal of certification from the State Ombudsman, citing a material failure to comply with one or more of the certification requirements stated in 101 CMR 30.09, or fails to perform all required duties of an ombudsman representative.

(3) The local ombudsman program director or the ombudsman representative may request that the State Ombudsman reconsider a decision to refuse, suspend, or remove the certification of a local ombudsman program director or ombudsman representative. The State Ombudsman will make the final determination to certify or to refuse, suspend, or remove certification under 101 CMR 30.09.

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30.10: Training Requirements for Ombudsmen Representatives

- (1) Basic Training for Ombudsman Representatives. The State Ombudsman will develop and conduct a training program to instruct ombudsman representatives, including local ombudsman program directors, in their duties and responsibilities as ombudsman representatives.
- (2) Examination for Certification. The State Ombudsman will develop and conduct a standardized written examination to measure an applicant's satisfactory completion of the ombudsman training program and their skills and knowledge necessary for certification as an ombudsman representative.
- (3) Ongoing Training for Ombudsman Representatives. Local ombudsman program directors will conduct follow-up trainings for local ombudsman representatives as prescribed by the State Ombudsman.
- (4) Ongoing Training for Local Ombudsman Program Directors. Local ombudsman program directors will attend the local ombudsman program director trainings scheduled by the State Ombudsman. Attendance at such trainings will be considered by the State Ombudsman in the re-designation of that local ombudsman program and the re-certification of the local ombudsman program director.

30.11: Access to Facilities and Related Records

- (1) Right of Entry. The State Ombudsman or their designee will have the right of entry into any facility located in Massachusetts as necessary to carry out the duties of the Ombudsman Program. An ombudsman representative will have the right of entry into any facility within the geographic area assigned to a local ombudsman program with which the representative is associated as necessary to carry out the duties of the local ombudsman program. The right of entry includes the forms of access set forth below.
- (2) Access to a Resident. The State Ombudsman and an ombudsman representative will have access to a consenting resident of a facility, in private, when the State Ombudsman or ombudsman representative determines it is necessary and reasonable for the purpose of:
 - (a) investigating and resolving complaints;
 - (b) interviewing residents; or
 - (c) offering the services of the Ombudsman Program to a resident.
- (3) Access to a Facility. The State Ombudsman and ombudsman representatives may access a facility when they determine access is necessary and reasonable for the purpose of:
 - (a) investigating and resolving complaints;
 - (b) interviewing employees or agents of the facility;
 - (c) consulting regularly with the facility administrator; or
 - (d) providing services authorized by law or regulation.
- (4) Access to Resident Records. The State Ombudsman and ombudsman representatives will have access to a resident's records and the records of a public agency as necessary to carry out their respective duties in the Ombudsman Program, including resident medical, social, and other

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records relating to a resident, and records concerning complaints, provided the resident or resident representative has communicated their informed consent to the Ombudsman Program to access to such records.

(5) Access to Contact Information. The State Ombudsman or ombudsman representative will have access to a resident representative's contact information if necessary to perform the functions and duties of the Ombudsman Program.

(6) Access to Resident Records if a Resident is Unable to Give Informed Consent. The State Ombudsman and ombudsman representative will have access to the records of a resident who is unable to give informed consent if access is necessary to perform the duties of the Ombudsman Program, provided:

- (a) there is no resident representative, or a resident representative refuses permission and the State Ombudsman or the ombudsman representative has reasonable cause to believe the resident representative is not acting in the best interest of the resident; and
- (b) the State Ombudsman authorizes access due to the circumstances.

(7) Access to Facility Policies. The State Ombudsman and ombudsman representatives will have access to the facility's administrative records, policies, and documents, to which the residents or the general public have access.

(8) HIPAA Requirements. The Health Insurance Portability and Accountability Act of 1996 (HIPAA) Privacy Rule does not preclude the release of health or identifying information to the Ombudsman Program, provided the Ombudsman Program received informed consent.

(9) Visitation Procedures. The State Ombudsman and ombudsman representative will make solicited or unsolicited visits to a resident of a facility. Solicited and unsolicited visits will proceed as follows.

- (a) When entering a facility, the State Ombudsman, or ombudsman representative will notify staff of their presence and produce identification upon request by the staff.
- (b) The State Ombudsman or ombudsman representative will be allowed to visit common areas of the facility and the doorway thresholds of the room(s) of a resident(s) without escort by facility personnel.
- (c) Prior to entering the room of a resident(s), the State Ombudsman or ombudsman representative will knock on the door or door frame, identify themselves, and explain the purpose of the visit.
- (d) The State Ombudsman or ombudsman representative may not enter the room(s) of a resident(s) unless the resident gives consent orally, in writing, or by a sign of affirmation by the resident.
- (e) The facility will permit the State Ombudsman or ombudsman representative to enter a consenting resident's room without escort by facility personnel.
- (f) During a visit to a resident's room, the State Ombudsman or ombudsman representative will respect the rights of other residents present in the room.

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30.12: Complaint and Problem Resolution Procedures for the Ombudsman Program

(1) Receipt of a Complaint(s). The State Ombudsman Program or local ombudsman programs will receive complaints, both oral and written, made by or on behalf of residents, and may also initiate a complaint on their own accord.

(a) The State Ombudsman Program and local ombudsman programs will receive complaints during regular business hours, Monday through Friday, excluding holidays.

(b) All complaints initiated or received by the State Ombudsman Program or local ombudsman programs will be reduced to writing and become part of a case file.

(c) Upon receipt of a complaint, an ombudsman representative will discuss the complaint with the resident (and, if the resident is unable to communicate informed consent, the resident's representative) to:

1. determine the perspective of the resident (or resident representative, where applicable) regarding the complaint;
2. request that the resident (or resident representative, where applicable) communicate informed consent in order to investigate the complaint;
3. determine the resident's wishes with respect to resolution of the complaint, including whether the allegations are to be reported and, if so, whether the ombudsman representative may disclose resident identifying information or other relevant information to the facility and/or appropriate agencies;
4. advise the resident (and the resident's representative, where applicable) that the resident's identity will not be disclosed without the resident's permission, and specify to whom the resident's identity may be disclosed if the resident consents. Such disclosure will be made without the resident's consent if ordered by a court of competent jurisdiction;
5. work with the resident (or resident's representative, where applicable) to develop a plan of action for resolution of the complaint;
6. investigate and contact those who may be involved in a resolution to attempt to verify the facts alleged in the complaint; and
7. determine whether the complaint is resolved to the satisfaction of the resident (or resident representative, where applicable).

(d) If informed consent is not provided to the ombudsman representative to discuss or proceed with the complaint, the resident or the resident representative will be provided with information and/or referral sources appropriate to enable the resident to advocate on their own behalf.

(e) Where the ombudsman representative determines the resident is unable to give informed consent and has no resident representative, the ombudsman representative will take appropriate steps to investigate and work to resolve the complaint to protect the health, welfare, safety, or rights of the resident.

(f) If the ombudsman representative has reasonable cause to believe the resident representative is not acting in the best interest of the resident, the ombudsman representative will work to protect the health, welfare, safety, or rights of the resident.

(g) Where a complaint is found to be unsupported, the ombudsman representative will inform the resident or resident representative, where applicable, of this finding as soon as possible after making such determination.

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- (h) If an ombudsman representative observes a practice in a facility which affects the resident or a number of residents in the facility, and such practice constitutes grounds for a complaint, the ombudsman representative may investigate and attempt to resolve such complaint without the consent of individual residents.
- (2) Resolution of a Supported Complaint. If an ombudsman representative has reasonable cause to believe a complaint is supported and obtains informed consent from a resident or resident representative to act, they will discuss the complaint with the appropriate staff member or contact person at the facility.
- (a) If the discussion with the facility staff member or contact person resolves the complaint without further action, the ombudsman representative will notify the resident or resident representative.
- (b) If the resident resides in a facility, is unable to give informed consent, and has no resident representative, the ombudsman representative will determine whether the complaint was sufficiently resolved to protect the health, welfare, safety, or rights of the resident.
- (c) If an ombudsman representative is unable to resolve the complaint, if access to records is denied, or a legal referral is required, the ombudsman representative will inform the local ombudsman program director. The local ombudsman program director will work with the ombudsman representative in the investigation and resolution of the complaint.
- (d) If such a complaint is referred to an attorney or a legal services organization and the Ombudsman Program is not able to resolve the complaint, the local ombudsman program will timely inform the resident or the resident representative and the State Ombudsman.
- (3) Consultation with the State Ombudsman. If a local ombudsman program is unable to access records or, after investigation, is unable to resolve a complaint, said program will refer the case to the State Ombudsman or their designee. The State Ombudsman or their designee will work with the local ombudsman program in a timely manner to access records or investigate and resolve the complaint.
- (a) If the State Ombudsman or their designee are unable to access records or, following investigation, determines an act, practice, or omission of the facility may adversely affect the health, safety, welfare, or rights of a resident, they will make recommendations for the elimination or correction of such act, practice, or omission to the appropriate executive at the facility involved.
- (b) Upon receipt of a complaint referred from a local ombudsman program, and any time during a subsequent investigation of the complaint, the State Ombudsman or their designee may refer the complaint to an appropriate agency, including law enforcement, for investigation and resolution.
- (4) Serious Violation Referrals. Local ombudsman programs will refer a complaint regarding possible serious violations of medical care, personal care, nursing care, treatment rules, fire safety regulations, or the law to the State Ombudsman, who will report it to EOHHS, the Massachusetts Department of Public Health, EOE, or the Office of the Attorney General, as appropriate, for investigation and resolution, with the informed consent of the resident.

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(5) Resolution of Complaints of Abuse, Mistreatment, or Neglect. If the State Ombudsman or an ombudsman representative has reasonable cause to believe abuse, mistreatment, or neglect of a resident may have occurred as set forth in M.G.L. c. 111, §§ 72F through 72L, they will comply with the complaint resolution procedures set forth in 101 CMR 30.12, 45 CFR 1324.19(b)(8), and 42 U.S.C. 3001 *et seq.*

(6) Documentation of Complaints. Local ombudsman programs will document all complaints in a format as directed by the State Ombudsman. The local ombudsman program director must ensure all complaints and other relevant information are updated in the case file not less than monthly. The State Ombudsman or their designee may review the case records, files, and other documents of the local ombudsman programs. The State Ombudsman may, at their discretion, require additional periodic reports from local ombudsman programs, which may include identification of barriers to effectively respond to complaints and patterns of significant problems relating to conditions or residents' care in facilities in its assigned geographic area.

30.13: Interagency Agreement

The Secretary of EOHHS will establish an interagency agreement among EOHHS and the Office of the Attorney General to provide for a cooperative effort in meeting the needs of the facility residents. This agreement will set forth procedures by which the State Ombudsman may report their findings or conclusions where an act, practice, or omission by a facility may constitute a violation of an applicable federal or state law or regulation to the regulatory agency or agencies having jurisdiction to enforce M.G.L. c. 6A, §16CC or 101 CMR 30.01 *et seq.*, or to the Office of the Attorney General. It will also set forth procedures for the coordination among the above-mentioned agencies during the pendency of a further investigatory or enforcement action.

30.14: Resident Council, Family Councils, and Community Advocacy Groups

As requested by resident groups, family groups, and community advocacy organizations, the State Ombudsman and ombudsman representatives will promote, and provide technical and general support, to protect the wellbeing and rights of residents.

30.15: Ombudsman Program Information, Disclosure, and Confidentiality Requirements

(1) Ombudsman Program Information. The State Ombudsman will be the custodian and manage the files, records, and other information of the Ombudsman Program (the "records"). Ombudsman Program records include records and files containing personal data concerning complaints held by State Ombudsman Program or local ombudsman programs.

(a) All requests for the disclosure of Ombudsman Program records, including personal data, other than that ordered by a court or authorized by statute or regulation, will be approved by the State Ombudsman or their designee, pursuant to 101 CMR 30.16(2) through (4).

(b) The State Ombudsman will have the sole authority to make or delegate determinations concerning the disclosure of the files, records, and other information maintained by the Ombudsman Program, subject to the prohibitions on release of certain information as set forth in 101 CMR 30.16(2).

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(2) Disclosure of Identity of Complainant or Resident.

(a) The State Ombudsman may not disclose the identity of a complainant or resident, either by name or by the release of sufficient information to allow the complainant or resident's identity to be inferred, without the informed consent of the resident, the resident's representative, or order by a court of competent jurisdiction.

(b) If the resident resides in a facility, is unable to give informed consent, and has no resident representative, the State Ombudsman or an ombudsman representative will not disclose the complainant or resident's identity unless:

1. there is reasonable cause to believe that action, inaction, or a decision may adversely affect the health, safety, welfare, or rights of said resident and disclosure is in the best interest of the resident;
2. there is no evidence the resident would not wish a referral to be made, including the disclosure of their identity; and
3. the ombudsman representative follows the policies and procedures of the Ombudsman Program, including receipt of approval from the State Ombudsman.

(3) Confidentiality of Communications. A person associated with the Ombudsman Program, including the State Ombudsman and ombudsman representatives, will, at all times, maintain and respect the confidentiality of all communications with a resident.

(4) Right to Privacy. The Ombudsman Program will, at all times, respect the rights of residents and will not subject the resident to photographing, filming, videotaping, or audiotaping without the written permission and informed consent of the resident or resident representative.

30.16: Conflict of Interest

(1) Organizational Conflict of Interest. An organizational conflict of interest includes, but is not limited to, any requirement by EOHHS or a host agency that the State Ombudsman or ombudsman representatives perform an act which conflicts with or appears to conflict with the objectives or responsibilities of the Ombudsman Program, or as otherwise specified in 42 C.F.R. 1324.21(a).

(2) Individual Conflict of Interest. An individual conflict of interest includes, but is not limited to, situations where the State Ombudsman, ombudsman representative, or their respective immediate family, holds an interest which conflicts with or appears to conflict with the objectives or responsibilities of the Ombudsman Program. An individual conflict of interest includes, but is not limited to, a personal financial interest, activity, or relationship that could impair the State Ombudsman or ombudsman representative from acting impartially and in the best interest of a resident, or as otherwise set forth in 42 C.F.R. 1324.21(c).

(3) The State Ombudsman and EOHHS will implement policies and procedures to identify and remove or remedy conflicts of interest as provided in 42 C.F.R. 1324.11(e)(4) and 42 C.F.R. 1324.21. Such policies will consider both organizational and individual conflicts of interest that may impact the effectiveness and credibility of the work of the Ombudsman Program. Policies and procedures addressing actual or potential conflicts of interest will:

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- (a) require that no individual, or member of the immediate family of an individual, involved in the employment or appointment of the State Ombudsman is subject to a conflict of interest;
 - (b) require agencies hosting local ombudsman programs to have policies in place prohibiting the employment or appointment of a local ombudsman representative with a conflict of interest that cannot be adequately removed or remedied;
 - (c) require the State Ombudsman to take reasonable steps to refuse, suspend, or remove designation and certification of an individual who has a conflict of interest, or who has a member of the immediate family with a conflict of interest, which cannot be adequately removed or remedied;
 - (d) establish methods by which the Ombudsman Program and EOHHS will periodically review and identify potential conflicts of interest of the State Ombudsman, ombudsman representatives, and local ombudsman programs; and
 - (e) establish the actions EOHHS, the State Ombudsman, or ombudsman representatives must take in order to remedy or remove such conflicts.
- (4) The State Ombudsman will report an organizational conflict of interest identified in the Ombudsman Program and describe the steps taken to remove or remedy the conflict in the annual report submitted to the National Ombudsman Reporting System.

30.17: Nondiscrimination in Service Delivery

A local ombudsman program, or the host agency within which it operates, will not deny services to or otherwise discriminate in the delivery of services to a resident on the basis of race, color, religion, sex, gender identity, sexual orientation, age, national origin, ancestry, physical or mental disability, or because such a person is a recipient of federal, state, or local public assistance. A local ombudsman program must comply with all applicable provisions of:

- (1) Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d *et seq.*);
- (2) Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) and the regulations promulgated thereunder (45 CFR 84);
- (3) M.G.L. c. 151B, § 4(10); and
- (4) Americans with Disabilities Act of 1990 (42 U.S.C. § 12101 *et seq.*).

30.18: Nondiscrimination in Employment

A local ombudsman program, or the host agency within which it operates, will not discriminate against a qualified employee or applicant for employment because of race, color, religion, sex, gender identity, sexual orientation, age, national origin, ancestry, or physical or mental disability, and must comply with the applicable provisions of all relevant state and federal laws, including but not limited to:

- (1) Title VII of the Civil Rights Acts of 1964 (42 U.S.C. 2000e *et seq.*);

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(2) M.G.L. c. 151B, §§ 4(1) and (16);

(3) Americans With Disabilities Act of 1990 (42 U.S.C. § 12101 *et seq.*); and

(4) Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) and the regulations promulgated pursuant thereto (45 CFR 84).

30.19: Affirmative Action

A local ombudsman program, or the agency within which it operates, will have in effect, maintain, and adhere to current Affirmative Action requirements as set forth in the Governor's Executive Order Number 227, as amended.

30.20: Severability

The provisions of 101 CMR 30.00 are severable. If any provisions of 101 CMR 30.00, or the applications of such provisions to any person or circumstance, are held invalid or unconstitutional, the remaining provisions of 101 CMR 30.00 shall not be affected thereby and shall remain in full force and effect.

REGULATORY AUTHORITY

101 CMR 30.00: M.G.L. c. 6A, § 16CC.