

Comments and Responses
Chapter 8
ARC 8772B

Rule Summary

The proposed amendments amend Chapter 8 related to the Long-Term Care Resident's Advocate/Ombudsman to comply with changes due to the enactment of 2010 Iowa Acts, Senate File 2263. The amendments update the chapter's purpose; remove definitions no longer necessary and adds new ones; removes rules on duties, access requirements, confidentiality; complaint referral, and the reporting system that are now in statute; and establishes procedures for notice and appeal of penalties assessed for interference with the official duties of a Long-Term Care Resident's Advocate/Ombudsman.

Comment Period

May 19, 2010, to June 8, 2010

Comments and Responses

The following individuals and organizations provided the written comments below:

- Bill Nutty, Director, Government Relations and Member Services, Iowa Association of Homes and Services for the Aging

Comment: 17 – 8.4(231) Interference. “A local long-term care resident’s advocate/ombudsman or trained volunteer who is denied access to a resident or tenant in a long-term care facility, assisted living program, or elder group home, or to **medical or personal records** [bold emphasis added] while in the course of conducting official duties...”

SF 2263, sec. 7, subsection 6 (a) Access to medical and personal records...“The state or a local long-term care resident’s advocate shall have access to the medical and personal records of an individual who is a resident or tenant of a long-term care facility...”

The enrolled version of SF 2263 doesn’t specify allowing a “trained volunteer” access to private, confidential medical or personal records, yet the noticed rules have been drafted to provide them access.

The state and local long-term care resident’s advocate/ombudsman are acting under their responsibilities as state employees, and therefore should be allowed limited access to a tenant’s or resident’s medical or personal information to protect that person’s health and welfare.

However, allowing a “volunteer” access to a tenant’s medical or personal records *without the tenant’s or resident’s permission* is at the very least an invasion of privacy. Unauthorized access by a volunteer to a tenant’s or resident’s personal health information contained in their medical record would likely violate the Health Insurance Portability and Accountability Act’s Privacy Provisions (HIPAA). This would expose the provider to significant liability and fines.

HIPAA’s privacy rules mandate “covered entities” (includes entities billing for healthcare services) “must reasonably limit uses and disclosures to the minimum necessary to accomplish their intended purpose.” The rules also mandate that covered entities must have procedures in place to limit who can access health care information, and implement training programs for employees about how to protect personal health information.

Recommended change. 17-8.3(231) Interference. “A local long-term care resident’s advocate/ombudsman or trained volunteer who is denied access to a resident’s advocate/ombudsman or trained volunteer who is denied access to a resident or tenant in a long-term care facility, assisted living program, or elder group home; or a local long-term care resident’s advocate/ombudsman who denied access to medical or personal records, while in the course of conducting official duties...”

Response: The statute permits a trained volunteer to review the clinical or other records of a resident or tenant (see 2010 Iowa Acts, Senate File 2263, sec. 5(d)). The rules; however, can define “trained volunteer” to specify only certain certified volunteers so there are limitations.

The proposed amendments define a “volunteer long-term care ombudsman” as a volunteer who has successfully completed all requirements and received certification from a long-term care resident’s advocate/ombudsman.”

The phrase “long-term care ombudsman certified under 17 – 8.7” was added after the word “volunteer” in 17 – 8.3 to clarify that only specific, certified individuals will qualify as a trained volunteer who has access to residents, tenants, and clinical or other records.

At this time, there are no individuals currently certified to serve as a volunteer long-term care ombudsman under what will become 17 – 8.7.

Comment: SF 2263, sec. 7, subsection. 7 (a) *Interference prohibited – penalties* include the sentence, “If the director imposes a penalty for a violation under this paragraph, no other state agency shall impose a penalty for the same interference violation.”

This language has been omitted from 17 – 8.4(231) Monetary civil penalties – basis.

Recommended change. 17 – 8.4(231) Monetary civil penalties – basis. “The director may impose a monetary civil penalty of \$1,500 on an officer, owner, director, or employee of a long-term care facility, assisted living program or elder group home who intentionally prevents, interferes with or attempts to impede the duties of the state or local long-term care residents

advocate/ombudsman. If the director imposes a penalty for a violation under this paragraph, no other state agency shall impose a penalty for the same interference violation.”

Response: The phrase “If the director imposes a penalty for a violation under this paragraph, no other state agency shall impose a penalty for the same interference violation” was added at the end of 17 – 8.4, which reflect the statute.

- John Hale, Policy Director, Iowa Caregivers Association

Comment: We would suggest that the Ombudsman, in addition to reporting an interference or denial, should be expected to make a recommendation to/discuss the recommendation with the Director regarding the imposition of a penalty. The Ombudsman will have the best information about the incident and would be in the best position to interpret what happened, to what extent, with what motives, etc.

Response: The phrase “in consultation with the state long-term care resident’s advocate/ombudsman” was added in 17 – 8.4 to clarify that a cooperative and consultative approach between the Department Director and the State Long-Term Care Resident’s Advocate/Ombudsman is the intention when a penalty for interference is considered.

Comment: We wonder whether the penalty can be both steeper and a graduated penalty? A \$1,500 penalty limit seems way too small if an lowan’s health and safety is potentially being compromised. We believe that an upper limit of \$5,000 would be appropriate. A graduated penalty (where the Director, in consultation with the Ombudsman, could determine any penalty amount within \$1 and the upper limit) would allow the Director to impose a fine amount deemed to be appropriate based on the circumstances.

Response: The assessed fine may not be more than permitted by statute, which sets the penalty at not more than \$1,500 for each violation (see 2010 Iowa Acts, Senate File 2263, sec. 7). The two types of access interference that are anticipated to be encountered involve access to residents and tenants and access to records. The State Long-Term Care Ombudsman does not consider one of these acts to be worse than the other; therefore, a graduated penalty system will not be utilized.

Comment: We also wonder where the dollars collected will go and how they will be used? We would suggest that the funds collected stay within the Ombudsman’s budget to be used for things related to Resident Advocates or Resident Advocate Committees, consumer education, or initiatives that would enhance the quality of care being provided.

Response: The statute requires that any penalties collected are required to be deposited into the State’s General Fund (see 2010 Iowa Acts, Senate File 2263, sec. 7).

- Anthony Carroll, Associate State Director for Advocacy, AARP Iowa

Comment:

AARP supports legislation and administrative rules that improve the lives and care of long-term care facility residents on behalf of both residents and the families and friends of those residents. AARP hereby submits these comments on the rules promulgated by Iowa's Department on Aging relating to Chapter 8, Long-Term Care Resident's Advocate/Ombudsman, ARC 8772B.

AARP supports the promulgated rules as written. These rules provide for the independent and unfettered access to Iowa's long-term care residents and medical records that Iowa's Long Term Care (LTC) Ombudsman needs to advocate on behalf of the residents. The coupling of effective penalties will discourage interference by LTC providers of regulations and ensure that LTC facilities, assisted living programs, and elderly group homes are well run and have the appropriate government oversight to ensure the safety and well being of those they serve.

These promulgated rules establish the monetary civil penalty and necessary due process steps (including a notice and appeals process) to the new citation/enforcement authority granted to Iowa's Long Term Care Ombudsman under SF 2263, which passed the 2010 General Assembly and has been signed into law. AARP strongly supported SF 2263 as brought forth by the Department on Aging because this new law will bring Iowa into compliance with Chapter 2 Section. 712(j) of the Older Americans Act, relating facility "Noninterference" with State LTC Ombudsman Program. As of July 1, 2010 Iowa will for the first time have the power to issue citations on facilities who deny entry to Iowa's Ombudsman representatives, or interfere with their work in protect Iowa's vulnerable LTC facility residents.

AARP appreciates the prompt work of Iowa's Department on Aging to attempt to bring the necessary Administrative Rules and Definitions online July 1, to coincide with SF 2263 effective date. This is critical because without these Definitions and Rules, the Ombudsman will not have the powers granted by SF 2263 to issue citations, a necessary threat provide maximum protection Iowa's LTC facility residents.

While AARP endorses the promulgated rules as written, we recognize these rules need to go through the necessary approval process. AARP strongly urges that if minor changes need to be made, they be done in a prompt fashion. Accordingly, AARP's priority is that Iowa have a set of Administrative Rules to allow the power and authority granted under SF 2263 to become effective and real on July 1, 2010. Of course, our hope is this power of actual citation is rarely used, but the mere threat of citation for interference is an equally powerful deterrent to interference as the actual citation.

With assisted living program decertification happening around Iowa, and increasing demand for LTC services in an aging state, Iowa's LTC residents deserve maximum protection under the law at the earliest possible date, July 1, 2010.

Thank you for your consideration of these comments on behalf of AARP's members across the state and the many residents/patients/long-term care consumers and their family members who rely on the protection and work of Iowa's Department on Aging and Iowa's LTC Ombudsman program.

Response: Comments express support of proposed amendments and no changes were requested.