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HEALTH Care and Protection of Indigent and Elderly Patients: Remove Restrictions on Ombudsman Visitation of Patients; Provide Ombudsman with Greater Access to Patient Records; Reduce Interference with Official Ombudsman Duties; Immunize Ombudsman from Liability; Provide Heightened Ombudsman Training Requirements

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HEALTH

***Care and Protection of Indigent and Elderly Patients:
Remove Restrictions on Ombudsman Visitation of Patients;
Provide Ombudsman with Greater Access to Patient Records;
Reduce Interference with Official Ombudsman Duties;
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Heightened Ombudsman Training Requirements***

CODE SECTIONS: O.C.G.A. §§ 31-8-52, -55, -60, -62 (amended)
BILL NUMBER: HB 557
ACT NUMBER: 493
GEORGIA LAWS: 1995 Ga. Laws 1239
SUMMARY: The Act removes restrictions that were previously imposed on ombudsman visitation of patients in long-term care facilities. The Act also gives an ombudsman greater access to patient records and prohibits others from interfering in either state or community ombudsman duties, setting up sanctions for those who interfere. Additionally, the Act shields an ombudsman from civil or criminal liability in the good faith performance of official duties. Further, the Act provides that ombudsman training shall include at least seven working days in a nursing home and at least three working days in a personal care home.

EFFECTIVE DATE: April 21, 1995¹

History

Georgia's ombudsman program has been in operation for eighteen years.² The program is "designed to protect nursing and personal care home residents, many of whom are frail or suffer from dementia."³ Duties of the ombudsman include the oversight

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1. The Act became effective upon approval of the Governor.
 2. Mark Sherman, *Bill Criticized as Hurting Review of Elderly Care*, ATLANTA J. & CONST., Mar. 10, 1995, at B4.
 3. *Id.*

of patient care and the investigation of complaints.⁴ Consequently, the role of the ombudsman may be somewhat at odds with the role of personal care and nursing home administrators.⁵ However, the ombudsman's role as counselor between residents and administrators often prevents the escalation of grievances to anger and abuse: "Such advocacy systems, merely by existing, probably deter many of the more blatant abuses in long term care."⁶

This bill was originally drafted to bring Georgia's ombudsman program in line with federal requirements.⁷ The previous Code section 31-8-55 restricted the hours in which an ombudsman could visit patients in a long-term care facility.⁸ Further, the above-mentioned Code section required that the ombudsman obtain permission from patients or their legal guardian before reviewing medical records.⁹ The purpose of the bill was to give Georgia's ombudsmen greater access to both the residents and

4. 42 U.S.C.A. § 3058g(a)(5)(B) (1994). Federal law requires that the state ombudsman system conform to provisions of 42 U.S.C.A. § 3058g in order for a state to qualify for certain federal funds. *Id.* § 3058g(a)(1). The federal statute states that an ombudsman shall:

(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.

Id. § 3058g(a)(5)(B).

5. Sherman, *supra* note 2.

6. Alison P. Barnes, *Beyond Guardianship Reform: A Reevaluation of Autonomy and Beneficence for a System of Principled Decision-Making in Long Term Care*, 41 EMORY L. J. 633, 710 (1992).

7. Sherman, *supra* note 2.

8. 1979 Ga. Laws 1240, 1244 (formerly found at O.C.G.A. § 31-8-55(b) (1991)).

9. *Id.*

their records, possibly increasing ombudsman duties¹⁰ and heightening the ombudsman's role as advocate.¹¹

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The Act brings Georgia's provisions for state and community ombudsmen into compliance with federal requirements.¹² The Act amends Code section 31-8-55 in several ways.¹³ The language prohibiting ombudsmen from visiting residents between the hours of 9:00 P.M. and 9:00 A.M. without good cause shown and twenty-four hour notice to the director of the facility is stricken from subsection (b) of this Code section.¹⁴ These restrictions on visitation were not consistent with the 1992 congressional amendment to the Older Americans Act, which directed that residents have access to ombudsmen.¹⁵ Further, subsection (b) is amended to give ombudsmen greater access to the medical and social records of residents.¹⁶ The Act gives ombudsmen access to such records in the following circumstances: when the resident or the resident's legal representative or guardian grants permission;¹⁷ when the resident cannot consent and does not have a representative or guardian;¹⁸ or when the representative or guardian refuses to permit access to records necessary to investigate a complaint, there is reason to believe the guardian is not acting in the resident's best interest, and the community ombudsman receives approval from the state ombudsman.¹⁹

In conjunction with the above provision, the Act amends subsection (b) to provide the definition of "legal representative."²⁰ This subsection is also amended to give

10. See Sherman, *supra* note 2.

11. Telephone Interview with State Ombudsman Becky Kurtz (June 5, 1995) [hereinafter Kurtz Interview].

12. *Id.*; Telephone Interview with Rep. Tom Sherrill, House District No. 62 (May 31, 1995) [hereinafter Sherrill Interview].

13. O.C.G.A. § 31-8-55 (Supp. 1995).

14. Compare 1979 Ga. Laws 1240 (formerly found at O.C.G.A. § 31-8-55(b) (1991)) with O.C.G.A. § 31-8-55(b) (Supp. 1995).

15. See 42 U.S.C.A. § 3058g(a)(3) (1994); Kurtz Interview, *supra* note 11.

16. O.C.G.A. § 31-8-55(b) (Supp. 1995).

17. *Id.* § 31-8-55(b)(1).

18. *Id.* § 31-8-55(b)(2).

19. *Id.* § 31-8-55(b)(3).

20. *Id.* § 31-8-55(b).

ombudsmen access to the administrative records and policies of the care facility.²¹

The Act strikes in its entirety subsection (g) of Code section 31-8-55, which prohibited interference with performance of the duties of state and community ombudsmen.²² This provision was incorporated into Code section 31-8-60, which is amended to prohibit any person from willfully interfering with ombudsmen in the performance of their official duties.²³ Violators are subject to sanctions under Code sections 31-2-6 and 31-5-8.²⁴

The Act also amends Code section 31-8-62. Previously, this section shielded ombudsmen from civil or criminal liability for statements made during an investigation of a resident's complaints.²⁵ The Act amends this section to shield ombudsmen from liability in the performance of all official duties.²⁶

As originally introduced on the House floor, the bill did not provide for any change in ombudsman training.²⁷ The bill was sent to the House Committee on Human Relations and Aging.²⁸ The Committee proposed increases in ombudsman training to include an internship of at least fourteen days in a nursing home and at least seven days in a personal care home.²⁹ The Committee believed that if ombudsman responsibilities were increased, the training requirements should also be increased.³⁰ This language specified the duration of internship in each type of

21. O.C.G.A. § 31-8-55(b) (Supp. 1995).

22. Compare *id.* § 31-8-55 (Supp. 1995) with 1979 Ga. Laws 1240, 1244 (formerly found at O.C.G.A. § 31-8-55(g) (1991)).

23. O.C.G.A. § 31-8-60 (Supp. 1995). This change was made so that the sections would "read" more clearly. Kurtz Interview, *supra* note 11.

24. O.C.G.A. § 31-8-60 (Supp. 1995).

25. 1979 Ga. Laws 1240 (formerly found at O.C.G.A. § 31-8-62 (1991)).

26. O.C.G.A. § 31-8-62 (Supp. 1995).

27. See HB 557, as introduced, 1995 Ga. Gen. Assem. Georgia ombudsmen currently receive more training than those in any other southeastern state. Kurtz Interview, *supra* note 11. Further, the federal requirements do not specify any on-site training requirements. Kurtz Interview, *supra* note 11.

28. Final Composite Status Sheet, Mar. 17, 1995.

29. HB 557 (HCS), 1995 Ga. Gen. Assem. This change was opposed by both the Personal Care Home Administrators and the Advocates for Aging because it would deter volunteers and fail to enhance the ombudsman's role as advocate for the resident. Kurtz Interview, *supra* note 11.

30. Kurtz Interview, *supra* note 11; see also Sherman, *supra* note 2.

facility,³¹ replacing the previous statutory language that internship was to take place “in a long-term care facility.”³²

The Committee further amended the bill by defining the term “legal representative” to mean “an agent under a valid power of attorney, provided that the agent is acting within the scope of his or her agency; an agent under a durable power of attorney for health care; or an executor, executrix, administrator, or administratrix of the estate of a deceased resident.”³³ The Georgia Nursing Home Association proposed this definition rather than the broader definition contained in the initial version of the bill.³⁴ The House passed the bill with the amendments suggested by the Committee and sent the bill to the Senate.³⁵

The Senate sent the bill to the Senate Committee on Youth, Aging, and Human Ecology.³⁶ The only suggestion made by this Committee was to replace the word “department” with “State Board of Nursing Home Administrators” in Code section 31-8-52³⁷ because this board oversees long-term personal care home requirements and licensing.³⁸ This change was excluded from the Act to keep the focus on the ombudsman’s role as an independent advocate, rather than compromising that independence through oversight by facility administrators.³⁹

31. HB 557 (HCA), 1995 Ga. Gen. Assem.

32. Compare HB 557 (HCA), 1995 Ga. Gen. Assem. with 1979 Ga. Laws 1240 (formerly found at O.C.G.A. § 31-8-52 (1991)).

33. O.C.G.A. § 31-8-55(b) (Supp. 1995). HB 557, as introduced, defined the term legal representation as:

a person who voluntarily, with the resident’s written authorization, may act upon the resident’s direction with regard to matters concerning the health and welfare of the resident, including but not limited to being able to access personal records contained in the resident’s file and receive information and notices pertaining to the resident’s overall care and condition.

HB 557, as introduced, 1995 Ga. Gen. Assem. This definition was used for consistency because it is similar to language previously enacted in 1994 Ga. Laws 461 (codified at O.C.G.A. § 31-8-132(b) (Supp. 1995)). Kurtz Interview, *supra* note 11.

34. Kurtz Interview, *supra* note 11.

35. Final Composite Status Sheet, Mar. 17, 1995.

36. *Id.*

37. See HB 557 (SCA), 1995 Ga. Gen. Assem.

38. Kurtz Interview, *supra* note 11. “Department” refers to the Department of Human Resources. See O.C.G.A. § 31-8-52 (Supp. 1995).

39. Kurtz Interview, *supra* note 11.

The bill ultimately went to conference committee.⁴⁰ The only change made to the House version of the bill was in Code section 31-8-52.⁴¹ The bill was amended to provide for a minimum of seven working days of training in a nursing home, instead of fourteen days, and a minimum of three working days of training in a personal care home, instead of seven days.⁴² The provision for a total of twenty-one days of internship, which was initially passed by the House,⁴³ met with criticism because it would deter volunteers from participating in the ombudsman program and was reduced to a total of ten days.⁴⁴ The House and Senate passed the conference committee substitute without change.⁴⁵

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40. Final Composite Status Sheet, Mar. 17, 1995.

41. Compare O.C.G.A. § 31-8-52 (Supp. 1995) with HB 557 (HCA), 1995 Ga. Gen. Assem.

42. Compare HB 557 (HCA), 1995 Ga. Gen. Assem. with O.C.G.A. § 31-8-52 (Supp. 1995). "[T]he thinking was that there was a need for hands-on, on-site training, without trying to micromanage [the long-term care organizations]. The consensus was that a number of training days [were necessary]." Sherrill Interview, *supra* note 12.

43. HB 557 (HCA), 1995 Ga. Gen. Assem.

44. See Sherman, *supra* note 2; Kurtz Interview, *supra* note 11.

45. Final Composite Status Sheet, Mar. 17, 1995.