

TREASURY - GENERAL

OMBUDSPERSON FOR THE INSTITUTIONALIZED ELDERLY

Office of the Ombudsman for the Institutionalized Elderly Practice and Procedure Rules

Proposed Readoption and Recodification with Amendments: N.J.A.C. 15A:3 as 17:39

Proposed New Rule: N.J.A.C. 17:39-1.1

Proposed Repeal: N.J.A.C. 15A:3-1.1

Authorized By: James W. McCracken, Ombudsman for the Institutionalized Elderly.

Authority: N.J.S.A. 52:27G-5.d and 26:2H-53 et seq.; and P.L. 2010, c. 34.

Calendar Reference: See Summary below for explanation of exception to calendar requirement.

Proposal Number: PRN 2014-217.

Submit comments by January 30, 2015, to:

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The agency proposal follows:

Summary

The Office of the Ombudsman for the Institutionalized Elderly (OOIE) was transferred from the Department of the Public Advocate to the Department of the Treasury by P.L. 2010, c. 34,

approved June 29, 2010. The law establishing the Department of Public Advocate was repealed and was rendered “null and of no effect” by P.L. 2010, c. 34. Because of the transfer to the Department of the Treasury, the rules proposed for readoption with amendments, a new rule, and a repeal in N.J.A.C. 15A:3 are also proposed to be recodified as N.J.A.C. 17:39.

Pursuant to N.J.S.A. 52:14B-5.1, N.J.A.C. 15A:3 was scheduled to expire on October 29, 2014. In accordance with N.J.S.A. 52:14B-5.1.c(2), the submission of this notice of proposal to the Office of Administrative Law on or before that date extended the expiration date 180 days, to April 27, 2015. The Ombudsperson reviewed the rules and procedures and determined them to be necessary, adequate, reasonable, proper, and responsive for the purpose for which they were originally promulgated, as proposed for change herein. Thus, the Ombudsperson proposes the readoption of the rules, with the recodification and amendments, repeal, and new rule discussed in this Summary.

Subchapter 1. General Provisions

Subchapter 1 sets forth the policies and procedures for receiving complaints and conducting investigations of alleged abuse, neglect, and exploitation of elderly residents of nursing homes including, but not limited to, other specified types of long-term care facilities. This subchapter includes a "Disclosure Consent Form," to be used by facilities when admitting residents, as required by the 2001 amendment to N.J.S.A. 52:27G-7.2 and 7.3 (P.L. 2000, c. 7).

N.J.A.C. 15A:3-1.1 is proposed for repeal and is replaced with new N.J.A.C. 17:39-1.1. The new rule expands the basic scope and objective of the Office of the Ombudsman. The new rule reflects the Federal statute, 42 U.S.C. § 3058g, that codifies the mission and scope of the Office of the Ombudsman. In September 2014, Federal regulations were approved and the new rule captures

these regulations. The Federal statute and regulations refer to the Office of the Ombudsman as the Long-Term Care Ombudsman. In addition, the proposed new rule incorporates the terminology “programs within the Office,” to address the Ombudsman’s role in the State’s new Medicaid Comprehensive Waiver Contract.

N.J.A.C. 15A:3-1.2, proposed for recodification as N.J.A.C. 17:39-1.2, defines words and phrases deemed essential to establishing the operative intent of this subchapter. The definition of “caregiver” is proposed for amendment to include “friends and family” to recognize seniors’ reliance on family and friends as caregivers in addition to caregivers who are employed or contracted by facilities. “Caregiver,” along with “act” is proposed for amendment to include the terms “managed care representative” and “managed care organizations care managers,” to reflect the State’s rebalancing of health delivery services and supports for seniors.

An amendment is proposed to the definition of “government agency” to include the word “licensing,” to include all regulatory agencies involved in the care of the elderly. The term “institutionalized elderly” is proposed for amendment to include “or program” after “facility,” to include all activities in which an elderly person may participate in. This amendment is also proposed to the term “resident,” along with the deletion of “including outpatient services” at the end of that existing definition. The proposed amendment to the definition of “State Program Coordinator” replaces “trained and qualified” with “qualified” to more effectively speak to the qualifications and duties of the coordinator. The definition of “Volunteer Advocate” is proposed for amendment to include the sentence, “Volunteer Advocates receive extensive training and are subject to criminal background checks,” to ensure that the volunteer advocates possess the appropriate skills to assist and advocate for the residents. The volunteers are subject to criminal background checks to be consistent with the Office’s requirements for its employees. All

employees of the Office of the Ombudsman must submit to a criminal background check because they have direct contact with the elderly. Prior to the amendment, Volunteer Advocates were not required to submit to such a background check. The Volunteer Advocates are designees of the Ombudsman and, therefore, need to submit to the process of a criminal background check.

A new definition, “Office Program,” has been added to further encompass new health care services and supports available to the elderly. The term “managed care organization” is proposed to be added to reflect the State’s philosophy on rebalancing healthcare for seniors through the State’s Comprehensive Waiver Program.

Amendments to “facility” are proposed, including the addition of programs and health care institutions offering health or health-related services to the institutionalized elderly; the additions of “licensing” and “funding” to “which is subject to regulation, visitation, inspection, or supervision by any government agency”; the addition of “social day care centers,” “the independent living section of continuing care retirement community,” “comprehensive rehabilitation hospital and separately licensed comprehensive rehabilitation units within general acute care hospitals”, “long-term acute care hospitals” and “Class ‘C’ and ‘D’ boarding homes” as examples of facilities; among the examples, the replacement of “mental hospitals, mental retardation centers or facilities” with “developmental centers”; and among the examples, the replacement of “day care facilities for the elderly” with “social day care centers for the elderly.” These amendments clarify the healthcare services and supports available to seniors. In the definition of “facility,” the addition of “the independent living section of continuing care retirement communities” as an example of a facility is proposed to be added to reflect the rules promulgated by the Department of Community Affairs at N.J.A.C. 5:19 pursuant to N.J.S.A. 52:27D-360.1 et seq. In the definition of “facility,” the addition of “comprehensive rehabilitation hospital and separately licensed comprehensive rehabilitation units

within general acute care hospitals” and “long-term acute care hospitals” as an example of a facility is proposed to be added to reflect the rules promulgated by the Department of Health at N.J.A.C. 8:39 and 8:85. Several types of facilities are proposed for deletion from this definition as those terms are no longer used and the facilities are covered and/or licensed under other types of hospitals referenced in the definition.

A new definition of “Volunteer Advocate Program” has been added, as the term is specifically referenced in the enabling legislation. The definition of “Regional Volunteer Coordinator” is proposed for deletion because positions within the Office of the Ombudsperson are not defined within the rules. Historically, the Regional Volunteer Coordinator’s positions were outsourced and administered by a private vendor. Currently, the Volunteer Advocate Program, including the Regional Volunteer Coordinator’s positions are administered by OOIE.

N.J.A.C. 15A:3-1.3, proposed for recodification as N.J.A.C. 17:39-1.3, provides information on the right of individuals to contact the OOIE, the OOIE's accessibility, and notices about the OOIE to be posted in facilities. These OOIE notices publicize the mission and activities of the OOIE. Subsection (b) is proposed for amendment to include the types of writing that may be used to contact the OOIE, to indicate that the Office of the Ombudsperson is not a first responder, and that if an individual requires immediate attention, they should call 9-1-1. These amendments are proposed to inform constituents of effective methods of communication with the Office. The amendment proposed to subsection (e) adds the phrase “which shall be provided by the Office” to advise the long-term care facilities of the notification process.

N.J.A.C. 15A:3-1.4, proposed for recodification as N.J.A.C. 17:39-1.4, explains the OOIE's complaint procedure, including the types of complaints to be investigated, the types of complaints that need not be investigated, the investigatory authority of the OOIE, the action to be taken by the

OOIE upon completion of the investigation, and the reporting obligation of the agencies and/or licensing boards upon referral of a substantiated allegation. In subsection (a), the word “facsimile” is proposed to be added to the types of transmittals that the OOIE will acknowledge and receive. Also, in subsection (a), the phrase “and/or complainant” has been added to reflect all possible ways the OOIE may handle complaints. “Electronic records” is proposed to be added to the types of records the OOIE can inspect and subpoena in paragraphs (d)3 and 5. Paragraph (e)2 is proposed for amendment to capture the Ombudsman’s mission as a resident-centered advocacy program.

N.J.A.C. 15A:3-1.5, proposed for recodification as N.J.A.C. 17:39-1.5, explains the reporting requirements under the Mandatory Adult Abuse and Exploitation Reporting Law, N.J.S.A. 52:27G-7.1 et seq., including the information to be provided when making a report, the OOIE procedures upon receipt of a report, the OOIE reporting requirements upon completion of an investigation, immunity for reporting or testifying, and the penalty upon failure to report. Amendments are proposed to paragraph (e)2 to include e-mail as a method for the Office to report its findings and paragraph (e)6 to include the “Attorney General” as an appropriate official to report to, if a determination is made indicating that an elderly person may have been criminally abused or exploited, as appropriate, to reflect the statutory language of N.J.S.A. 52:27G-7.e.

N.J.A.C. 15A:3-1.6, proposed for recodification as N.J.A.C. 17:39-1.6, sets forth the confidentiality and privilege provisions concerning all matters in relation to a complaint or investigation, in accordance with the OOIE's enabling statute.

N.J.A.C. 15A:3-1.7, proposed for recodification as N.J.A.C. 17:39-1.7, prohibits discrimination, disciplinary, or retaliatory action against certain persons who, in good faith, communicate with or provide information to aid the OOIE in carrying out its duties.

N.J.A.C. 15A:3-1.8, proposed for recodification as N.J.A.C. 17:39-1.8, establishes the penalties for willfully hindering the lawful actions or willfully refusing to comply with the lawful demands of the OOIE.

N.J.A.C. 15A:3-1.9, proposed for recodification as N.J.A.C. 17:39-1.9, specifically establishes the authority of the Volunteer Advocate within the Volunteer Advocate Program. Subsection (a) is proposed for amendment to delete the “State Program Coordinator, under the direction of the Ombudsperson,” and replace the phrase with the “Ombudsperson.” The subsection is further amended to clarify that the Volunteer Advocates will act as the Ombudsperson’s representative, to advise that OOIE’s responsibility and accountability to the institutionalized elderly is administered by its volunteers and volunteer program and to indicate that the Volunteer Advocates will be trained and certified by the Ombudsperson’s Office and supervised by a Statewide Volunteer Coordinator, rather than the rule specifically requiring reporting to the Regional Volunteer Coordinator. Subsection (b) is proposed for deletion as the substance of that subsection is now included in subsection (a). Recodified subsection (b) is proposed for amendment to indicate, similar to the amendment to subsection (a), that the Ombudsperson, through the Statewide Coordinator shall coordinate the efforts of the Volunteer Advocates, to be consistent with duties for the Ombudsperson as outlined in the statute.

Subchapter 2. Procedures Required Prior to Withholding or Withdrawing Life-Sustaining Treatment from Elderly, Institutionalized Residents

Subchapter 2 sets forth the policies and procedures for carrying out the OOIE's role in circumstances involving proposals to withhold or to withdraw life-sustaining treatment from residents of nursing homes and other long-term care facilities, pursuant to guidelines set forth by the

New Jersey Supreme Court in the cases of *Matter of Farrell*, 108 N.J. 335 (1987), *Matter of Peter*, 108 N.J. 365 (1987), *Matter of Jobes*, 108 N.J. 394 (1987), and *Matter of Conroy*, 98 N.J. 321 (1985); and the standards set forth in the Advance Directives for Health Care Act, N.J.S.A. 26:2H-53 et seq., and the Physician Orders for Life-Sustaining Treatment Act, N.J.S.A. 26:2H-120 et seq. The OOIE views its role as being two-fold: (1) to oversee the processes established by the Court in *Peter* and in *Conroy*; and (2) to assist the institutionalized elderly, their families and surrogates, their healthcare providers, and the facilities in which they reside, in making life-sustaining treatment decisions that fully express the wishes of the resident.

N.J.A.C. 15A:3-2.1, proposed for recodification as N.J.A.C. 17:39-2.1, explains the OOIE's role in proposals to withhold or withdraw life-sustaining medical treatment from facility residents. Paragraph (a)2, concerning the assistive role of the OOIE, is proposed for amendment to add the terms "legal representative and legal guardians" after "families and friends," in accordance with the Health Care Decisions Act, N.J.S.A. 26:2H-53 et seq. In subsection (b), the proposed amendment adds the term "Physician Orders for Life-Sustaining Treatment (POLST)."

N.J.A.C. 15A:3-2.2, proposed for recodification as N.J.A.C. 17:39-2.2, defines words and phrases deemed essential in establishing the intent of this subchapter. "Regional Long-Term Care Ethics Committee" is proposed for amendment to delete the phrase "its members." The deletion ensures that the Regional Long-Term Care Ethics Committees provide health related services that are authorized under the auspices of the Office of the Ombudsperson. A further proposed amendment to this term adds the phrase "its' residents, their family members, surrogate decision makers, and managed care organizations." The addition ensures that the Regional Long-Term Care Ethics Committees provide health related services to a broader constituency that supports and advocates for the elderly population. This section is also proposed for amendment to add the term

“Physician Orders for Life-Sustaining Treatment (POLST) form.” This addition recognizes the recently enacted legislation, N.J.S.A 26:2H-129 et seq., which established the use of a standardized form that provides a means by which an individual can have his or her wishes and preferences regarding life-sustaining treatment converted into a medical order.

N.J.A.C. 15A:3-2.3, proposed for recodification as N.J.A.C. 17:39-2.3, explains when the OOIE must be informed of a proposal to withhold or withdraw life-sustaining medical treatment. It also indicates the circumstances under which reporting is not required. The proposed amendment to subsection (b) adds “managed care organization representatives” and “managed care organization care manager,” for the reasons discussed above. The addition reflects the State’s philosophy on rebalancing healthcare for seniors through the State’s Comprehensive Waiver Program, 42 CFR Part 489 Subpart I . The proposed amendment to this subsection also adds the contact information for the OOIE. The addition provides more information to the public. N.J.A.C. 15A:3-2.3(d) lists the circumstances under which the section’s reporting procedures do not apply. The proposed amendment to paragraph (d)3 adds when the resident has a fully executed and valid Physician Orders for Life Sustaining Treatment (POLST) form.

N.J.A.C. 15A:3-2.4, proposed for recodification as N.J.A.C. 17:39-2.4, sets forth the procedure for withholding or withdrawing life-sustaining treatment for residents who are not capable of making healthcare decisions. The procedures include notification to the OOIE when required under the rules, written evidence from the attending physician as to the resident's condition, notification to the facility by the OOIE, inquiry into the resident's intent by the OOIE, including written or oral declarations or designations and interviewing persons with knowledge of the resident's intent, and engagement by the OOIE of two non-attending physicians. Proposed new subparagraph (e)6vi adds “private insurance” as a source of compensation for the physicians

engaged by the OOIE to reflect the change in the State's philosophy of rebalancing health care services for seniors.

N.J.A.C. 15A:3-2.5, proposed for recodification as N.J.A.C. 17:39-2.5, sets forth the procedure for the use of Do Not Resuscitate orders in facilities.

N.J.A.C. 15A:3-2.6, proposed for recodification as N.J.A.C. 17:39-2.6, sets forth the procedure for the use of Do Not Hospitalize orders in facilities.

Chapter Appendix A sets forth the Ombudsperson Disclosure Consent Form.

The Office of the Ombudsperson for the Institutionalized Elderly has provided a 60-day comment period on this notice of proposal, therefore, this notice is excepted from the rulemaking calendar requirements pursuant to N.J.A.C. 1:30-3.3(a)5.

Social Impact

The Office of the Ombudsperson is charged with promoting the health, safety, and welfare of New Jersey's elderly population, through investigations of abuse, neglect, exploitation, legislative and regulatory advocacy, policy work, education, and outreach. OOIE is also responsible for advocating and ensuring, as a whole and in particular cases, the adequacy of care received and the quality of life experienced by elderly (age 60 and over) patients, residents, and clients of nursing homes and other specified types of long-term care facilities within this State. The rules proposed for readoption and recodification with amendments, a new rule, and a repeal continue the policies and procedures for receiving complaints and conducting investigations of alleged abuse, neglect, and exploitation of elderly residents of facilities and also for carrying out the Office's role in circumstances involving proposals to withhold or withdraw life-sustaining treatment. As such, the proposed rules have a profound and positive impact on the lives of seniors.

In addition, the POLST legislation reflected in the proposed amendments to Subchapter 2 may have a direct relationship on advance care planning and health care decisions in the context of withholding and withdrawing life-sustaining treatment.

Economic Impact

The existing requirements impose minimal, if any, cost upon the population served and the long-term care industry. The OOIE provides a toll-free hotline to take complaints from all persons, both voluntary and mandatory. At most, facilities provide staff time in order to report incidents and support investigations. The amount of time necessary will be directly proportionate to the amount of complaints arising from that facility. The facilities will incur a minimal photocopying cost due to the statutory requirement of a consent form to be distributed to residents upon admission, found in N.J.A.C. 15A:3-1.5(l). The POLST legislation reflected in the proposed amendments to Subchapter 2 may have an impact on advance care planning in the context of withholding and withdrawing life-sustaining treatment. The legislation may potentially reduce the cost of expensive medical treatments at the end of life.

Federal Standards Statement

The rule proposed for readoption and recodification with amendments, a new rule, and a repeal are not subject to Federal standards or requirements. The states are required under the Older Americans Act, 42 U.S.C. §§ 3001 et seq., to have an Ombudsperson program, but the specific design of that program is left to the states. Thus, a Federal standards analysis is not required.

Jobs Impact

The Office does not believe that the rules proposed for readoption and recodification with amendments, a new rule, and a repeal will result in the creation or loss of jobs in the State.

Agriculture Industry Impact

There will be no impact on the agriculture industry as a result of the rules proposed for readoption and recodification with amendments, a new rule, and a repeal.

Regulatory Flexibility Analysis

The rules proposed for readoption and recodification with amendments, a new rule, and a repeal minimally impact small businesses, if at all. Few of the facilities over which the Office exercises jurisdiction qualify as small businesses, as defined under the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq. Most of the facilities are nursing homes or assisted living residences. The enabling statute mandates reporting of alleged abuse and exploitation of elderly residents age 60 or older under certain circumstances, as well as full cooperation with investigations conducted by the Office. The rules proposed for readoption and recodification with amendments, a new rule, and a repeal continue long-standing policies and procedures, established by prior regulation, ensuring statutory compliance. These reporting and investigation compliance provisions require few, if any, economic or other resources, other than staff time to make the report and provide the necessary documents concerning the investigation. Compliance does not require the use of professional services. Thus, the financial impact of compliance upon smaller facilities offering health care services to the elderly is minimal. Moreover, they are statutorily mandated and cannot be waived or varied by the Office. The chapter also includes procedures for carrying out the Office's role in circumstances involving proposals to withhold or withdraw life-sustaining treatment. Reporting to

the Office is required under certain circumstances, consistent with the New Jersey Supreme Court mandate. The chapter will not impose additional reporting requirements, but will impose various recordkeeping and compliance requirements upon licensed health care facilities providing services to individuals 60 years of age and older. These requirements are discussed in the Summary above. No additional professional services will be needed to comply with the chapter. The costs of compliance with the chapter are discussed in the Economic Impact above. The Office believes that the chapter should be uniformly applied to all health care facilities involved in providing health services to individuals 60 years of age and older, to insure the health, safety, welfare, and civil and human rights of such individuals, and, therefore, no differing compliance requirements are provided based upon the size of the business.

Housing Affordability Impact Analysis

The rules proposed for readoption and recodification with amendments, a new rule, and a repeal are not expected to have an impact of the cost of housing. The rules govern the practice and procedures of the OOIE, including policies and procedures for receiving complaints and conducting investigations of alleged abuse, neglect, and exploitation of elderly residents of nursing homes and other specified types of long-term care facilities, and policies and procedures for carrying out the OOIE's role in circumstances involving proposals to withhold or to withdraw life-sustaining treatment from residents of nursing homes and other long-term care facilities.

Smart Growth Development Impact Analysis

The rules proposed for readoption and recodification with amendments, a new rule, and a repeal are not expected to have an impact of the housing production in Planning Areas 1 or 2, or

within designated centers, under the State Development and Redevelopment Plan. The rules govern the practice and procedures of the OOIE, including policies and procedures for receiving complaints and conducting investigations of alleged abuse, neglect, and exploitation of elderly residents of nursing homes and other specified types of long-term care facilities, and policies and procedures for carrying out the OOIE's role in circumstances involving proposals to withhold or to withdraw life-sustaining treatment from residents of nursing homes and other long-term care facilities.

Full text of the rules proposed for readoption may be found in the New Jersey Administrative Code at N.J.A.C. 15A:3.

Full text of the proposed recodification, amendments, repeal, and new rule follows (additions indicated in boldface **thus**; deletions indicated in brackets [thus]):

CHAPTER [3] **39**

OFFICE OF THE OMBUDSPERSON FOR THE INSTITUTIONALIZED ELDERLY PRACTICE AND PROCEDURE RULES

SUBCHAPTER 1. GENERAL PROVISIONS

[15A:3-1.1 Scope

The basic objective of the Office of the Ombudsperson for the Institutionalized Elderly is of promoting, advocating and ensuring, as a whole and in particular cases, the adequacy of the care received, and the quality of life experienced, by elderly patients, residents and clients of facilities offering health or health-related services for the institutionalized elderly within New Jersey. The Office of the Ombudsperson advocates for the health, safety and welfare, and the civil and human rights of the institutionalized elderly, age 60 or over, and takes such actions as are necessary, and within its jurisdiction, to secure same.]

17:39-1.1 Scope

Within the Office is the State Long-Term Care Ombudsperson, whose duty is to receive, investigate, and resolve complaints concerning certain health-care facilities serving the elderly, to oversee programs within the Office, and to initiate actions to secure, preserve, and promote the health, safety, and welfare, and the civil and human rights, of the elderly patients, residents, and clients of such facilities. The Ombudsperson for the Institutionalized Elderly has been designated the State Long-Term Care Ombudsman pursuant to and in accordance with the provisions of 42 U.S.C. §§ 3058g et seq. The Office of the Ombudsperson for the Institutionalized Elderly is responsible for securing, preserving, and promoting the health, safety, and welfare of New Jersey's elderly population, through investigations of abuse, neglect, and exploitation; legislative and regulatory advocacy; policy work; and education and outreach.

[15A:3]17:39-1.2 Definitions

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise:

"Abuse" means the willful infliction of physical pain, injury, or mental anguish; unreasonable confinement; or the willful deprivation of services [which] **that** are necessary to maintain a resident's physical and mental health. "Abuse" shall also mean imposing treatment upon a resident who has the capacity to make healthcare decisions, after the resident has made a voluntary and informed choice regarding such treatment. "Abuse" shall also mean providing to a resident treatment that is not medically indicated. However, no resident shall be deemed to be

abused for the sole reason that he or she is being furnished non-medical remedial treatment by spiritual means through prayer alone, in accordance with a recognized religious method of healing, in lieu of medical treatment, if it is shown through the Office's review that the resident subscribes to such religious method of healing. "Abuse" also shall not mean the withholding or withdrawal of life-sustaining treatment in accordance with the provisions of N.J.A.C. [15A:3]~~17:39-2~~.

An "act" of any facility, [or] government agency, **or managed care organization** shall be deemed to include any failure or refusal to act by such facility or government agency.

...

"Caregiver" or "caretaker" means a person employed or contracted to provide care or services to an elderly person, and includes, but is not limited to, **family, friends**, the [administrator] **staff** of a facility, **managed care organization representative, and managed care organization care managers**.

...

"Facility" means any facility **or program, health care institution**, or institution, whether public or private, offering health or health-related services for the institutionalized elderly, and which is subject to **licensing**, regulation, visitation, inspection, [or] supervision, **or funding** by any government agency. Facilities include, but are not limited to, nursing homes, [skilled nursing homes,] intermediate care facilities, [extended care facilities, convalescent homes, rehabilitation centers,] assisted living facilities, residences, and programs, residential healthcare facilities, comprehensive personal care homes, special hospitals, **comprehensive rehabilitation hospitals and separately licensed comprehensive rehabilitation units within general acute care hospitals, long-term acute care hospitals**, veterans' hospitals, [chronic disease hospitals,] psychiatric hospitals, [mental hospitals, mental retardation centers or facilities, day care facilities]

social day care centers for the elderly, **adult** medical day care centers, [and] adult family care homes, **developmental centers, the independent living section of continuing care retirement communities, and class “C” and “D” boarding homes.** "Facility" shall not mean a correctional facility or an acute care medical center [but shall include a rehabilitation facility housed within an acute care medical center].

"Government agency" means any department, division, office, bureau, board, commission, authority, or any other agency or instrumentality created by the State or to which the State is a party, or by any county or municipality, which is responsible for the **licensing**, regulation, visitation, inspection, or supervision of facilities, or which provides services to patients, residents, or clients of facilities.

"Institutionalized elderly," "elderly," or "elderly person" means any person 60 years of age or older, who is a patient, resident, or client of any facility **or program.**

“Managed care organization” means an entity that has, or is seeking to qualify for, a comprehensive risk contract, and that is:

1. A Federally qualified HMO that meets the advance directives requirements of 42 CFR Part 489 Subpart I; or

2. Any public or private entity that meets the advance directives requirements and is determined to also meet the following conditions:

i. Makes the services it provides to its Medicaid enrollees as accessible (in terms of timeliness, amount, duration, and scope) as those services are to other Medicaid recipients within the area served by the entity; and

ii. Meets the solvency standards of 42 CFR 438.116.

...

"Office" means the Office of the [Ombudsman] **Ombudsperson** for the Institutionalized Elderly.

“Office Program” refers to statutory or other activities operating under the auspices and with the approval of the Ombudsperson. Office Programs shall include, but are not limited to: Investigation and Advocacy in response to Complaints Program; The Volunteer Advocate Program; Oversight of the Regional Long-Term Care Ethics Program; The I Choose Home NJ/Money Follows the Person Program; and Outreach/Education Program.

...

["Regional Volunteer Coordinator" means an individual trained and qualified to administer and supervise the Volunteer Advocate Program, and who is capable and willing to promote the Program's philosophy throughout the community being served.]

"Resident" means any elderly person who is receiving treatment or care in any facility in all its aspects, including, but not limited to, admission, retention, confinement, commitment, period of residence, transfer, discharge, and any instances directly related to such status. For purposes of this chapter, the term "resident" shall also include an elderly patient or client who is receiving treatment or care in any facility[, including outpatient services] **or program.**

"State Program Coordinator" means an individual [trained and] qualified to administer and supervise the Volunteer Advocate Program throughout the entire State of New Jersey, and who is capable and willing to promote the Program's philosophy throughout the community being served.

"Volunteer Advocate" means an individual trained and certified by the Office to make regular weekly visits to assigned long-term care facilities. **Volunteer Advocates receive training and are subject to criminal background checks.** A Volunteer Advocate may exercise, but need

not be limited to, such functions as visitation, consultation, problem solving, eliciting complaints, and generally serving as an advocate on behalf of the institutionalized elderly.

“Volunteer Advocate Program” is the means by which the Ombudsperson promotes and ensures community contact with residents of long-term care facilities, expands the outreach of the Office, enhances the Office’s ability to protect residents’ rights, and ensures quality of care.

[15A:3]17:39-1.3 Contact with the Office; information about rights and entitlements; communications

(a) (No change.)

(b) The Office may be contacted by calling its toll-free telephone number (877-582-6995), 24 hours per day, any day of the year; or by writing to: The Office of the Ombudsperson for the Institutionalized Elderly, [Department of the Public Advocate,] PO Box 852, Trenton, New Jersey 08625-0852; via e-mail, ombudsperson@ooie.nj.gov; or facsimile, (609) 943-3479. **The Office of the Ombudsperson is not a first responder. Individuals that require immediate attention in an emergency should call 911.**

(c)-(d) (No change.)

(e) The administrator of each facility shall ensure that such written notice, **which shall be provided by the Office**, is given to every resident or his or her next of kin or guardian, as appropriate, upon admission to the facility and to every person already in residence or his or her next of kin or guardian, as appropriate. The administrator shall also post such written notice in a conspicuous, public place in the facility.

(f)-(g) (No change.)

[15A:3]17:39-1.4 Complaint procedure

(a) If a complaint identifies the complainant, the Office shall acknowledge receipt of all complaints by letter, **facsimile**, telephone, or e-mail. If the Office does not have jurisdiction, the Office shall so advise the person making the complaint and shall promptly refer the complaint **and/or**

complainant, to the appropriate government agency.

(b) –(c) (No change.)

(d) During the course of any investigation conducted by the Office, the Office may:

1.-2. (No change.)

3. Enter without notice and, after notifying the person in charge of its presence, inspect the premises of a facility or government agency and inspect any books, files, medical records, **electronic records**, or other records that pertain to residents, which are required by law to be maintained by the facility or government agency;

4. (No change.)

5. Compel any person to produce at a specific time and place, by subpoena, any documents, books, records, **electronic records**, papers, objects, or other evidence [which] **that** the Office reasonably believes may relate to a matter under investigation.

(e) Upon completing an investigation of a complaint, the Office shall take one or more of the following courses of action, as appropriate:

1. (No change)

2. If Office representatives are able to substantiate a complaint, they may work with facility or government agency representatives, as appropriate, to remedy the problem(s) that exist **and advocate on behalf of the resident.**

3.-7. (No change.)

(f)–(g) (No change.)

[15A:3]17:39-1.5 Reporting requirements and complaint procedures under the Mandatory Adult Abuse and Exploitation Reporting Law, N.J.S.A. 52:27G-7.1 et seq.

(a) Any caregiver, social worker, physician, registered or licensed practical nurse, **managed care organization representative, managed care organization care manager**, or other professional, who, as a result of information obtained in the course of his or her employment, has reasonable cause to suspect or believe that an institutionalized elderly person is being or has been abused or exploited, shall report such information to the Office within one business day from the time when such individual acquired such information. Any other person having reasonable cause to suspect or to believe that an elderly person is being or has been abused or exploited may report such information to the Ombudsperson or to the person designated by the Ombudsperson to receive such report.

(b) –(c) (No change.)

(d) The Office complaint procedure is as follows:

1. Within 24 hours of receipt of a report of abuse or exploitation, the Office shall notify [the Public Advocate or the Public Advocate's designee, and] any government agency [which] **that** regulates or operates the facility.

2. The Office shall investigate a complaint alleging elderly abuse or exploitation by utilizing the procedure set forth in N.J.A.C. [15A:3]17:39-1.4. In addition, an investigation shall include a visit with the elderly person who has allegedly been abused or exploited and consultation with others who have knowledge of the particular case.

(e) Upon completing its investigation, the Office shall report its findings and recommended action, if any, in writing, to:

1. (No change.)

2. The resident's legal guardian or other person named on the consent form pursuant to (l) below, by certified and regular mail, **or e-mail**, except that the Office may withhold reporting to such person upon evidence that such person was a party to the abuse, neglect, or exploitation of the resident;

3. (No change.)

[4. The Public Advocate or the Public Advocate's designee;]

[5.] **4.** (No change in text.)

[6.] **5.** The **Attorney General**, county prosecutor's office, or any other appropriate prosecuting agency, if a determination is made that an elderly person may have been criminally abused or exploited; and

[7.] **6.** (No change in text.)

(f) The name of any person who reports suspected abuse or exploitation pursuant to this subchapter shall not be disclosed, unless:

1.-2. (No change.)

3. Disclosure is authorized under N.J.A.C. [15A:3]**17:39**-1.6(a).

(g)-(j) (No change.)

(k) Where the report alleging elderly abuse or exploitation pertains to the withholding or withdrawal of life-sustaining treatment from an incapacitated elderly resident, reporting shall be governed by N.J.A.C. [15A:3]**17:39**-2.

(l) (No change.)

Recodify existing N.J.A.C. 15A:3-1.6, 1.7, and 1.8 as **17:39-1.6, 1.7, and 1.8** (No change in text.)

[15A:3]17:39-1.9 Volunteer Advocate Program

(a) The [State Program Coordinator, under the direction of the] Ombudsperson[,] shall develop programs for use, training, and coordination of volunteers and shall also be responsible for the development of policies and procedures for the administration of the Volunteer Advocate Program. These Volunteer Advocates shall serve to promote the well-being and quality of life of residents of long-term care facilities[. They shall be required to report to the Regional Volunteer Coordinator.] **and will act as the Ombudsperson's representatives in the long-term care facility to which they are assigned. They shall be trained and certified by the Ombudsperson's Office and supervised by a Statewide Volunteer Coordinator.**

[(b) The Office shall retain responsibility for its volunteer advocates by acquiring the services of Regional Volunteer Coordinators, who shall be responsible to the Ombudsperson through the State Program Coordinator. The Regional Volunteer Coordinator shall recruit, train and supervise Volunteer Advocates to advocate on behalf of the institutionalized elderly 60 years of age and over.]

[(c)] **(b)** The [State Program Coordinator, under the direction and supervision of the] Ombudsperson, **through the Statewide Volunteer Coordinator**, shall coordinate the efforts of the Volunteer Advocate [program] **Program** for the Office with all relevant government agencies and with the administrators of such private facilities as may be deemed appropriate to ensure coordination and to avoid duplication of effort, so that the Volunteer **Advocate** Program will

genuinely serve the interests of the institutionalized elderly without disrupting the legitimate function of any facility.

SUBCHAPTER 2. PROCEDURES REQUIRED PRIOR TO WITHHOLDING OR
WITHDRAWING LIFE-SUSTAINING TREATMENT FROM ELDERLY,
INSTITUTIONALIZED RESIDENTS

[15A:3]17:39-2.1 Purpose

(a) The purpose of this subchapter is to clarify the Office's role in circumstances involving proposals to withhold or to withdraw life-sustaining treatment **for** residents of facilities, pursuant to guidelines set forth by the New Jersey Supreme Court in the cases of *Matter of Farrell*, 108 N.J. 335 (1987), *Matter of Peter*, 108 N.J. 365 (1987), *Matter of Jobes*, 108 N.J. 394 (1987), and *Matter of Conroy*, 98 N.J. 321 (1985). The Office views its role as being [twofold] **two-fold**:

1. (No change.)
2. To assist the institutionalized elderly, their families and friends, **legal representative and legal guardians**, their healthcare providers, and the facilities in which they reside in making life-sustaining treatment decisions that fully express the wishes of the resident.

(b) Where there is no clear "duty to report" as outlined in N.J.A.C. [15A:3]17:39-2.3, the Office is available to provide technical support, assistance, and dispute resolution, should there be disagreement regarding the withholding or withdrawal of life-sustaining treatment, whether or not the resident has the capacity to make a healthcare decision, and whether or not an Advance Directive ("Living Will") or Proxy Directive ("Durable Power of Attorney for Health Care" **or**

“Physician Orders for Life Sustaining Treatment”) is involved. The Office's function in any such situation is to promote, advocate, and ensure the rights of the institutionalized elderly resident, pursuant to New Jersey Supreme Court guidelines and the **guideposts set forth in the New Jersey Advance Directives for Health Care Act, N.J.S.A. 26:2H-53 et seq., and the Physician Orders for Life-Sustaining Treatment Act, N.J.S.A. 26:2H-129 et seq.**

[15A:3]17:39-2.2 Definitions

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise:

...

“Physician Orders for Life Sustaining Treatment (POLST) form” means a standardized form created under the authority of the New Jersey Department of Health, N.J.S.A. 26:2H-129 et seq., that sets forth a person’s wishes and preferences regarding life-sustaining treatment and is signed and dated by the person’s attending physician or advanced practice nurse thereby converting the person’s wishes and preferences into a medical order.

"Regional Long-Term Care Ethics Committee" means a group composed of healthcare and community members, who have participated in an Ombudsperson-approved training course, and acting under the auspices and with the approval of the Ombudsperson, provides education, policy development, and case consultation services to its [member] facilities, **residents, their family members, surrogate decision makers, managed care organizations representative, and managed care organizations case manager.**

...

[15A:3]17:39-2.3 Duty to report

(a) (No change.)

(b) Any caregiver, social worker, physician, registered or licensed practical nurse, **managed care organization representative, managed care organization care manager**, or other professional who has reasonable cause to suspect that withholding or withdrawing life-sustaining treatment from an elderly, incapacitated resident of a facility would be an abuse of that resident shall report such information to the Office. **The Office may be contacted by calling its toll-free telephone number (877-582-6995), 24 hours per day, any day of the year, or by writing to: The Office of the Ombudsperson for the Institutionalized Elderly, PO Box 852, Trenton, New Jersey 08625-0852. OOIE is not a first responder. Individuals that require immediate attention in an emergency should call 911.**

(c) (No change.)

(d) The reporting procedures set forth in this section shall not apply when:

1.-2. (No change.)

3. The resident has a fully executed and valid Advance Directive ("Living Will") [or] **under the provisions of N.J.S.A. 26:2H-53, Proxy Directive ("Durable Power of Attorney for Health Care"), or Physician Orders for Life Sustaining Treatment** under the provisions of N.J.S.A. 26:2H-[53]129 et seq.;

4.-6. (No change.)

[15A:3]17:39-2.4 Procedure for residents incapable of making healthcare decisions

(a) Unless one or more of the circumstances set forth in N.J.A.C. [15A:3]~~17:39~~-2.3(d) apply, the surrogate decision-maker for the resident shall notify the Office, in writing, of a contemplated decision to withhold or to withdraw life-sustaining treatment from the resident.

(b)–(d) (No change.)

(e) Concurrent with its intent inquiry, the Office shall engage the services of two physicians, unaffiliated with the facility and with the attending physician, to confirm the resident's medical condition and prognosis.

1.-5. (No change.)

6. Each physician shall be compensated by one or more of the following:

i. –iv. (No change.)

v. Medicare or Medicaid; [and/or]

vi. Private insurance; and/or

[vi.] **vii.** (No change in text.)

(f)–(l) (No change.)

Recodify existing N.J.A.C. 15A:3-2.5 and 2.6 as **17:39-2.5 and 2.6** (No change in text.)