

Date of Hearing: June 25, 2013

ASSEMBLY COMMITTEE ON AGING AND LONG-TERM CARE  
Mariko Yamada, Chair  
SB 609 (Wolk) – As Amended: April 11, 2013

SENATE VOTE: 37-0

SUBJECT: Office of the State Long-Term Care Ombudsman.

SUMMARY: Establishes various accounts within the state's Special Deposit Fund, and increases fines for willfully interfering with the Long-Term Care Ombudsman program's lawful actions from a maximum of \$1,000 to a maximum of \$2,500. Specifically, this bill:

- 1) Establishes the "Long-Term Care Ombudsman Improvement Act Account" within the state's Special Deposit Fund to receive funds, gifts, and contributions, of which the receipt or solicitation would not jeopardize the independence and objectivity of the office of the Long-Term Care Ombudsman, to support the operations of the Long-Term Care Ombudsman program.
- 2) Establishes the "Access to Facilities Account" within the state's Special Deposit Fund for the purposes of receiving civil monetary penalties collected as a result of enforcement of a statutory prohibition against willfully interfering with a Long-Term Care Ombudsman program representative's attempt to access a long-term care facility, or to meet confidentially with a resident of a long-term care facility.
- 3) Increases the civil monetary penalty assessed by the Director of the California Department of Aging (CDA) against any person who willfully interferes with any lawful action of the office of the Long-Term Care Ombudsman from \$1,000 to \$2,500.

EXISTING LAW

- 1) Establishes the Special Deposit Fund as a trust fund in the State Treasury to provide a depository for money received in trust for specific purposes by a department for which no other fund has been created to receive those funds. Permits a department to establish accounts through a request of the Department of Finance (DOF) and, upon DOF approval, the State Controller's Office.
- 2) Establishes the Long-Term Care Ombudsman program as a result of the federal Older Americans Act (OAA) and places it within the CDA in order to encourage community contact and involvement with elderly patients or residents of long-term health care facilities or residential facilities through the use of volunteers and volunteer programs.
- 3) Requires the Ombudsman, either personally or through representatives, to identify, investigate, and resolve complaints that may adversely affect the health, safety, welfare, or rights of residents of long-term care facilities.

- 4) Provides that investigation of reports of known or suspected instances of abuse in long-term care facilities is the responsibility of the Bureau of Medi-Cal Fraud and Elder Abuse (within the Office of the Attorney General), the local law enforcement agency, and the Long-Term Care Ombudsman program.
- 5) Requires that representatives of the Ombudsman program shall have access to long-term care facilities and residents, appropriate access to review the medical and social records of a resident, as specified, and access to specified records of patients and the facility.
- 6) Prohibits willful interference with the functions of the Ombudsman representative and the Ombudsman program, to prohibit retaliation and reprisals by a long-term care facility, and to provide for appropriate sanctions with respect to the interference, retaliation, and reprisals.
- 7) Provides that representatives of the Ombudsman shall have the right to enter and move about long-term care facilities to identify, hear, investigate, resolve complaints observe and monitor conditions of residents and facilities, speak confidentially with residents, and provide services to assist residents in protecting their health, safety, welfare, and rights.
- 8) Requires the office of the Ombudsman to solicit and receive funds, gifts, and contributions to support the operations and programs of the office. Permits the office to form a foundation eligible to receive tax-deductible contributions for this purpose.

**FISCAL EFFECT:** According to the Senate Appropriations Committee, SB 609 is projected to generate minor annual revenue increases, while creating minor ongoing expenditures for state Long-Term Care Ombudsman activities and for local ombudsman activities.

**COMMENTS:**

**Author's Statement:** "The purpose of the State Long-Term Care Ombudsman is to protect and advocate for the rights, health and safety of long-term care facility residents, oftentimes the elderly. California's State Ombudsman has designated this responsibility to the 35 local ombudsmen programs (local agencies on aging) throughout the state. The local ombudsmen are responsible for making site visits of the facilities in an effort to identify, investigate, and resolve complaints that may adversely affect the health, safety, welfare, or rights of residents of long-term care facilities. Unfortunately, local ombudsmen cannot perform their responsibilities if he or she is not permitted through the front door of a facility.

While current law prohibits any person who willfully interferes with the lawful action of an ombudsman, subject to a penalty of \$1,000, complaints about willful interference and local ombudsmen being denied access to facilities continues to be a problem.

In summary, SB 609 seeks to ensure the state ombudsman and his local representatives have access to facilities by increasing the penalty for willful interference from \$1,000 to \$2,500, and to improve the manner in which complaints are handled from local ombudsmen, to the State Ombudsman and the CDA.

**Background:** The CDA administers the State Long-Term Care Ombudsman (SLTCO) program as part of its mission to serve older adults, adults with disabilities, family caregivers, and residents in long-term care facilities throughout the State. The federal OAA requires states to establish a SLTCO program to investigate and resolve complaints made by or on behalf of residents of long-term care facilities, protecting residents' rights, and advocating for systemic change in the long-term care system. According to the author, the Office of the State Long-Term Care Ombudsman has an extremely important role in protecting and advocating for the rights and health and safety of long-term care facility residents, and in providing leadership, direction, and support to local long-term care ombudsman programs.

The Long-Term Care Ombudsman Program is a community-supported program of local volunteers who serve an integral role as representatives of this program, as they make personal visits to long-term care facilities. The Office of the State Long-Term Care Ombudsman and its 35 local Ombudsman Program Coordinators are responsible for recruiting, training, and supervising the volunteer Ombudsman representatives. Ombudsman services are free and strictly confidential. Federal and State law authorize the SLTCO and local long-term care ombudsman to enter long-term care facilities, unescorted and unhindered, in order to receive complaints from residents without fear of retaliation. State law provides for immediate referral to the appropriate licensing authority (Department of Social Services Community Care Licensing in the case of non-medical long-term care facilities and Department of Public Health, Licensing and Certification in the case of skilled nursing and intermediate care facilities), and a civil penalty up to \$1000, to be assessed by the Director of the CDA if any person willfully interferes with any lawful action of the Ombudsman.

**At Issue:**

1. **Willful Interference:** According to the author and supporters, some facilities have not allowed local ombudsman to walk into residents' rooms without an escort, or have prevented ombudsman from meeting privately with residents.
2. **Inadequate Deterrent:** According to the author, the current penalty of \$1,000 has been in place for 30 years and is an insufficient deterrent to sanction facilities for willful interference.
3. **Unmet Training and Outreach Needs:** The author asserts that penalties collected are better utilized to fund more outreach to facilities by local ombudsman program volunteers and training to perform site visits.

**Willful Interference:** The author cites recent incidences where local Ombudsman representatives have approached long-term care facilities and were refused entry into the facility or confidential access to residents, despite state law requiring facilities to grant unhindered access. Requiring ombudsmen to have escorts, preventing them from meeting confidentially with residents, and preventing them from accessing certain parts of a facility or records, constitutes willful interference. Some local ombudsman programs state that, for years, some facilities have refused to allow ombudsman representatives to enter facilities without an escort.

According to the Office of the State Long-Term Care Ombudsman, since 2010, there have been six incidents of willful interference where a local ombudsman program requested the assistance of the state office. Of the six incidents, four were resolved with the intervention of the Office of the State Long-Term Care Ombudsman while two incidents required the imposition of civil

penalties by CDA. Prior to 2010, there is no history of an imposition of civil penalties for willful interference.

When a local Ombudsman program representative experiences interference, such as being refused entry into a facility or is refused interaction with residents without supervision of facility staff, that Ombudsman representative is to provide the State Ombudsman office in Sacramento with details of the event. The State Ombudsman then asks the local Ombudsman program coordinator to send a letter to the facility documenting the event, informing the provider of the Ombudsman's right to access, including a copy of the Ombudsman access laws. Once the provider has received this information, the State Ombudsman requests the local Ombudsman to return to the facility.

If the local Ombudsman representative experiences additional interference, the local Ombudsman program coordinator informs the State Ombudsman in Sacramento again. The State Ombudsman then sends a letter to the facility asserting state and federal law granting access rights. The letter warns the facility that, if the interference continues, the State Ombudsman will ask the Director of CDA to sanction the facility. The State Ombudsman then asks the local Ombudsman program to visit the facility a third time. If the facility continues to deny access or willfully interferes with the duties of the Ombudsman, the local program documents the most recent events and provides that information to the State Ombudsman.

In the instance of willful interference, following two letters and two visits, the State Ombudsman in Sacramento reviews the case, and presents the information to the Director and legal counsel of CDA. The Director then decides whether to sanction the facility, and determines the amount of the sanction, taking into account the severity, and previous attempts to inform the provider about access laws and willful interference. Title 22, Div. 1.8, Chap. 6, Art. 3, section 8045 provides guidance to the Director when considering a penalty amount, up to the current limit of \$1,000, currently authorized by state law (the extent of the violation, good faith by the licensee and the prior history of willful interference by the facility).

Since 2010, CDA reports there were six instances of willful interference, and states that in all but two of these cases, the warning letter from the State Ombudsman was sufficient to end the interference. In the other two cases, the CDA levied the maximum penalty when the warning letter to the facility went unheeded. One of the fines was not paid, and the issue has been brought before Small Claims Court.

Advocates and the author are concerned that the process associated with enforcing access laws is cumbersome and lengthy, which defeats the purpose of the state prohibition against willful interference. The author's office states that willful interference leads to isolation of a resident which could be characterized as a form of elder abuse as defined in section 15610.07 of the Welfare and Institutions Code. State law provides for at least misdemeanor level citations for willfully interfering with emergency medical technicians (EMTs), firefighters and law enforcement. The CDA writes that "because this is an emerging issue, enacting a statute to address the process may be premature and not result in increased enforcement. Alternatively, the Office of the State Long-Term Care Ombudsman is proposing to develop a written procedure, in conjunction with local Ombudsman Programs, to address the willful interference complaints and sanction process." According to CDA, such procedure will be incorporated in the Ombudsman Program Manual currently in use by local programs.

Because "isolation" as a form of elder abuse may be present, the CDA and the SLTCO may wish to consider policies to address willful interference which includes an immediate report to local law enforcement as provided by existing mandatory elder abuse reporting statutes (WIC 15630, et. seq.) when they undertake the development of written procedures.

Inadequate deterrent: The author further states that the current penalty of \$1,000 has been in place for 30 years (Chapter 1625, Statutes of 1984) and is an insufficient deterrent against violations. Under section 9732 of the Welfare and Institutions Codes, The Director of the CDA is required to initiate an assessment at the request of the SLTCO office. SB 609 increases the maximum penalty from \$1,000 to \$2,500, requires the Director of CDA to assess the penalty, and establishes a 30-day period to pay the fine before the CDA initiates collection activities. By increasing the penalty to \$2,500, the author believes that the Ombudsman will have a stronger mechanism to deter willful interference and support access to residents and facilities without interference.

Unmet training and outreach needs: SB 609 also directs penalties collected to be deposited into the "Access to Facilities Account" which will be created by the measure, within the state's Special Deposit Fund. SB 609 then directs no less than 75% of those funds to defray the direct travel costs associated with local ombudsman visits, or training of local ombudsman representatives throughout the state.

Additionally, SB 609 provides clarifying amendments to a foundation authorized by SB 345 (Chapter 649, Statutes of 2012). SB 609 creates the Long-Term Care Ombudsman Improvement Act Account within the State's Special Deposit Fund to receive funds in the State's Treasury, and restricts deposits to contributions, gifts, or funds that will not jeopardize the independence and objectivity of the office or the foundation.

#### PROPOSED AMENDMENT

*On page 3, line 38, add:*

(b) Each instance of willful interference may be reported to local law enforcement and the appropriate licensing agency as an instance of isolation pursuant to section 15610.07.

~~(b)~~ (c)...

#### RELATED LEGISLATION

- AB 477 (Chau) -- Establishes notaries public as mandated reporters of elder and dependent adult abuse.
- AB 663 (Gomez) -- Establishes training requirements for long-term care facility administrators and long-term care ombudsman regarding the unique needs of California's lesbian, gay, bisexual, transgender communities.
- AB 973 (Quirk-Silva) -- Promoting culture change within long-term health care facilities.

- SB 345 (Chapter 649, Statutes of 2012) -- Strengthened the State Ombudsman's ability to advocate on behalf of long-term care residents' rights, safety, and welfare; strengthened SLTCO autonomy.
- AB 40 (Chapter 659, Statutes of 2012) -- Codifies federal protocol related to facility-based abuse reports, including direct-to-law enforcement reports of serious events.
- SB 1895 (Chapter 1096, Statutes of 1995) and AB 2800 (Chapter 10897, Statutes of 1995) -- Mello-Granlund Older Californians Act reauthorization.

REGISTERED SUPPORT / OPPOSITION:

Support

American Federation of State, County and Municipal Employees (AFSCME)  
Area Agency on Aging of Lake & Mendocino Counties  
California Catholic Conference  
California Commission on Aging  
Consumer Federation of California  
County Welfare Directors Association of California (CWDA)  
Ventura County Board of Supervisors

Opposition

None on file.

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