

Pursuant to the authority vested in the Commissioner of Health by Section 218 of the Elder Law and Section 2803-c of the Public Health Law, Sections 405.28(f) and 411.1 of Title 10 (Health) and Section 485.13 of Title 18 (Social Services) of the Official Compilation of Codes, Rules and Regulations of the State of New York are amended, to be effective upon publication of a Notice of Adoption in the New York State Register, to read as follows:

Section 405.28(f) of Title 10 NYCRR is amended to read as follows:

(f) The hospital shall develop and implement written policies and procedures relating to the long term care ombudsman program as provided for in section 218 of the Elder [545 of the Executive] Law and section 2803-c of the Public Health Law which provide the following:

(1) The hospital shall permit and not restrict or prohibit access to the hospital by duly designated ombudsman who are performing their official duties on behalf of hospital inpatients who have been admitted from, or who are awaiting readmission to, a residential health care facility licensed under article 28 of the Public Health Law, or an adult care facility licensed under section 461-b of the Social Services Law.

(2) The hospital and the hospital staff shall permit and not interfere with confidential visits and communications between such inpatients and such ombudsman except in the case of in-person visits which are medically contraindicated. Such medical contraindication shall be documented for that patient by the attending practitioner in the patient's medical record.

(3) The hospital and the hospital staff shall not retaliate or take reprisals against any patient, employee or other person, who has filed a complaint with, or provided information to, such ombudsmen.

Section 411.1 of Title 10 NYCRR is amended to read as follows:

The operator shall:

(a) ensure that long-term care ombudsmen who are duly certified and designated by the State Office for the Aging pursuant to section two hundred eighteen of the elder law shall have access to a residential health care facility without restriction, and shall prohibit interference with ombudsmen when they are performing their official duties and [retaliation] retaliation or reprisal against any resident, employee or other person, who has filed a complaint with, or provided information to, such ombudsmen;

(b) ensure privacy and confidentiality in such visits with the [patients] residents by duly authorized ombudsmen; and

(c) ensure that [records access] ombudsmen [specially designated under section 544 of the State Executive Law] shall have access to medical and personal records, subject to the following provisions and exceptions:

(1) [the patient/resident, or, where appropriate, the patient's/resident's appointed committee provide express written consent] access by an ombudsman must be provided when:

(i) the resident or the resident representative, as defined in paragraph (f) of subdivision 1 of section 218 of the elder law, has provided informed consent in writing or through the use of auxiliary aids or services;

(ii) the resident or resident representative communicates informed consent orally, visually, or through the use of auxiliary aids and services, and such consent is documented contemporaneously by an ombudsman; or

(iii) access is necessary in order to investigate a complaint, the resident representative refuses to consent to the access, an ombudsman has reasonable cause to believe that the resident

representative is not acting in the best interests of the resident, and the ombudsman obtains the approval of the state long-term care ombudsman.

(2) periods of access shall include normal business hours, and may include other times mutually acceptable to the ombudsmen and the facility by appointment;

(3) one or more members of the facility's staff shall be available to arrange for inspection, interpretation, and, for a reasonable fee, to photocopy such records; and

(4) a physician's personal notes, which shall mean the physician's speculations, reminders, impressions other than diagnostic impressions, and other information unrelated to treatment decisions, may be excluded from disclosure;

(d) ensure that residents, employees or other person(s) may file complaints with or provide information to any long-term care [patient] ombudsman as specified in subdivision (a) of this section [411.1(a) of this Part].

Section 485.13 of Title 18 NYCRR is revised to read as follows:

(a)

(1) An operator must not restrict or prohibit the access to the residents of the facility nor interfere with the performance of the official duties of a duly authorized ombudsman certified by the State Office for the Aging.

(2) Such access shall be permitted [for at least 10 hours between 9 a.m. and 8 p.m. daily] at any time during a facility's regular business hours or regular visiting hours.

(3) In addition to the access permitted under paragraph (2) of this subdivision, an operator shall not restrict access at other times if the ombudsman is seeking to investigate a complaint or is responding to a specific request of a resident.

(4) The operator shall not interfere with the privacy and confidentiality of the visits between the resident and the ombudsman.

(5) An operator may not retaliate nor take reprisals against any resident, employee or other person for having filed a complaint with or having provided information to a duly authorized ombudsman.

(b)

(1) The operator shall not restrict or prohibit access by ombudsmen to resident records maintained by the operator, provided that:

(i) [the person seeking access has been specially designated as a records access ombudsman by the director of the State Office for the Aging; and

(ii)] the resident [or, where appropriate, a committee for an incompetent,] or resident representative has given [express written] informed consent in writing or through the use of auxiliary aids and services;

(ii) the resident or resident representative has given informed consent orally, visually, or through the use of auxiliary aids and services, and such consent is documented contemporaneously by an ombudsman; or

(iii) access is necessary in order to investigate a complaint, the resident representative refuses to consent to the access, an ombudsman has reasonable cause to believe that the resident representative is not acting in the best interests of the resident, and the ombudsman obtains the approval of the state long-term care ombudsman.

(2) Access to records shall be permitted between 9 a.m. and 5 p.m., Monday through Friday.

(3) The operator shall designate a member or members of staff who shall be responsible

for providing access to such records and, where necessary, interpretation of such records.

(4) [Records access ombudsmen] Ombudsmen shall have the right to photocopy onsite such records; however, records shall not be removed from the facility by the ombudsman.

(5) The operator may charge a reasonable fee, not to exceed \$1 per page, for photocopying.

(6) Disclosure to a duly designated [records access] ombudsman, pursuant to [the express written consent of a resident] paragraph (1) of this subdivision (b), shall not, based solely on such disclosure, give rise to any claim as to a breach of confidentiality by the operator.

(7) Nothing in this section shall be construed to permit access to a physician's records, clergy records, or to other community service agency records, which are not maintained by the operator as part of the resident's records.

(c) The operator shall require anyone seeking access to the facility or to resident records as an authorized ombudsman to show identification and to sign a visitor's register or like record.

## NOTICE OF CONSENSUS RULEMAKING

### **Statutory Authority:**

Section 2803-c of the Public Health Law and Section 218 of the Elder Law

### **Basis:**

No person is likely to object to the adoption of the rule, as written, because the changes made are limited to: (i) conforming changes to reflect recent amendments to the Elder Law with respect to access by certified long-term care ombudsman to long-term care facilities and to resident records maintained by such facilities, with which facilities are legally required to comply; (ii) amendments that are technical in nature which would remove reference to “records access” ombudsmen, as this distinction has been removed in the Elder Law through recent amendments; and (iii) amendments that are technical in nature relating to references to repealed sections of the Executive Law, the provisions of which were transferred to the Elder Law pursuant to chapter 642 of the Laws of 2004. The rule is proposed to make technical amendments and to conform regulations to the statutory requirements of section 218 of the Elder Law. It would impose no requirements not already applicable through statute, and no person is likely to object to its adoption.

## **JOB IMPACT STATEMENT**

A Job Impact Statement is not required for the proposed regulatory amendments. The purpose of the proposed regulatory amendments is to update current State regulations pertaining to long-term care facilities to conform to statutory requirements contained in section 218 of the Elder Law. Specifically, 18 NYCRR section 485.13 would be amended to conform to statutory requirements regarding conditions under which certified long-term care ombudsmen must be provided access to facilities and to resident records and would also include technical amendments removing reference to “records access” ombudsmen, as this distinction no longer exists in the Elder Law. Title 18 NYCRR section 411.1, addressing ombudsmen access to residential care facilities, would be amended to conform to statutory requirements regarding conditions under which certified long-term care ombudsmen must be provided access to resident records and would also include technical amendments relating to citation, spelling, and use the term “records access” ombudsmen. Title 18 NYCRR section 405.28(f) would include a technical amendment relating to the current reference to section 545 of the Executive Law, as the provisions of that statute were transferred to the Elder Law pursuant to chapter 642 of the laws of 2004.

These amendments are proposed as a consensus rule to conform regulations to the statutory requirements of Section 218 of the Elder Law and Section 2803-c of the Public Health Law and impose no requirements not already applicable through statute. It is apparent from the nature and the purpose of the proposed regulatory amendments that this rule will have no impact on jobs or employment opportunities.