

**TITLE 9 HUMAN RIGHTS**  
**CHAPTER 2 AGING**  
**PART 19 LONG TERM CARE OMBUDSMAN**

**9.2.19.1 ISSUING AGENCY:** New Mexico Aging and Long-Term Services Department (Department).  
[9.2.19.1 NMAC – Rp, 9.2.19.1 NMAC, 9/26/17]

**9.2.19.2 SCOPE:** These rules apply to the Department, its Office of the State Long-Term Care Ombudsman (Office), ombudsmen, including the State Long-Term Care Ombudsman (state ombudsman) certified staff and volunteers, provider agencies, private nonprofit organizations and area agencies on aging.  
[9.2.19.2 NMAC – Rp, 9.2.19.2 NMAC, 9/26/17]

**9.2.19.3 STATUTORY AUTHORITY:** Older Americans Act of 1965 (OAA), 42 USC 3001, *et seq.*, as amended; New Mexico Long-Term Care Ombudsman Act, New Mexico Statutes Annotated 28-17-1 *et seq.*  
[9.2.19.3 NMAC – Rp, 9.2.19.3 NMAC, 9/26/17]

**9.2.19.4 DURATION:** Permanent.  
[9.2.19.4 NMAC – Rp, 9.2.19.4 NMAC, 9/26/17]

**9.2.19.5 EFFECTIVE DATE:** September 26, 2017, unless a later date is stated at the end of a section.  
[9.2.19.5 NMAC – Rp, 9.2.19.5 NMAC, 9/26/17]

**9.2.19.6 OBJECTIVE:** These rules govern the conduct of the Office in fulfilling its duties under the OAA and the New Mexico Long-Term Care Ombudsman Act (Act) by protecting the health, safety, welfare and rights of residents of long-term care facilities in this state, to investigate and resolve complaints of such residents, and to report on conditions of long-term care facilities. The Department shall establish and operate the Office either directly or by contract or other arrangement with a public agency or nonprofit private organization. The Office is a distinct entity, separately identifiable, located within or connected to the Department, and, in the event the Department enters into contract or other arrangement with a public agency or nonprofit organization, that agency or organization shall establish a separately identifiable, distinct entity as the Office.  
[9.2.19.6 NMAC – Rp, 9.2.19.6 NMAC, 9/26/17]

**9.2.19.7 DEFINITIONS:**

- A. “Area Agency on Aging” (AAA)** means an agency designated by the Department to arrange for the provision of aging services in its planning and service area pursuant to an area plan;
- B. “Certification”** means the designation provided by the state ombudsman to an individual who meets minimum qualifications, is free of conflicts of interest, and has successfully completed training and other criteria stipulated in Section 9.2.19.13 NMAC hereof, which authorizes such individual to act as a representative of the Long-term Care Ombudsman Program (Program) in the capacity for which he or she is certified;
- C. “Complaint”** means information regarding action, inaction, or decisions that may adversely affect the health, safety, welfare, or rights of residents which is raised by or brought to the attention of an ombudsman;
- D. “Guardian”** means the person or entity appointed by a court to exercise the legal rights and powers of another individual;
- E. “Immediate family”** means those persons related to an individual as a spouse, child, sibling, or parent;
- F. “Informed Consent”** means an agreement by a resident or a resident's surrogate decision-maker to allow a disclosure of information, made with full knowledge of the risks involved and the available alternatives, that is made in writing or through the use of auxiliary aids and services or communicated by a resident or a resident's surrogate decision-maker orally, visually or through the use of auxiliary aids and services and such consent is documented contemporaneously by a representative of the office;
- G. “Long-Term Care Facility”** means any residential facility that provides care services to one or more persons unrelated to the owner or operator of the facility, including, but not limited to, those facilities enumerated in NMSA 1978 section 28-17-3(F);
- H. “Long-Term Care Ombudsman Program” (Program)** means the program through which functions and duties of the Office are carried out, consisting of the state ombudsman, the Office headed by the state ombudsman and the representatives of the office.

**I. “Surrogate decision maker”** means a legally appointed agent, guardian or surrogate who is authorized to act on behalf of a resident to include the duties enumerated in NMSA 1978 section 28-17-3(O);

**J. “Provider agency”** means the entity designated by the state ombudsman to provide ombudsman services in a particular service area;

**K. “Representatives”** means the employees or volunteers designated by the state ombudsman to fulfill the duties set forth in 45 CFR 1324.19(a), whether personnel supervision is provided by the state ombudsman or his or her designee.

**L. “Resident”** means any patient, client or person residing in and receiving care in a facility; and

**M. “State Long-Term Care Ombudsman”** (State Ombudsman) means the individual who heads the Office and is responsible to personally, or through representatives of the Office, fulfill the functions, responsibilities and duties as set forth in 45 CFR 1324.13 and 1324.19.

[9.2.19.7 NMAC – Rp, 9.2.19.7 NMAC, 9/26/17]

**9.2.19.8 PHILOSOPHY:** The Program is a resident-centered advocacy program. The long-term care facility resident or applicant for residency is the client, regardless of the source of the complaint or request for service. The Office shall assist residents by protecting their health, safety, welfare and rights, to investigate and resolve complaints of such residents, and to report on conditions of long-term care facilities.

[9.2.19.8 NMAC – Rp, 9.2.19.8 NMAC, 9/26/17]

**9.2.19.9 OFFICE RULE:** The state ombudsman shall assure that all residents of long-term care facilities in the state have access to Program services. The state ombudsman may fulfill its responsibilities through the Department either directly or by a Department contract or other arrangement with a public agency or nonprofit private organization. Any such agency or nonprofit entity that contracts with the Department to provide ombudsman services must employ a full-time state ombudsman.

[9.2.19.9 NMAC – Rp, 9.2.19.9 NMAC, 9/26/17]

**9.2.19.10 DESIGNATION OF OMBUDSMAN PROGRAMS: [RESERVED]**

[9.2.19.10 NMAC – Rp, 9.2.19.10 NMAC, 9/26/17]

**9.2.19.11 DE-DESIGNATION OF OMBUDSMAN PROGRAMS: [RESERVED]**

[9.2.19.11 NMAC – Rp, 9.2.19.11 NMAC, 9/26/17]

**9.2.19.12 QUALIFICATION AND CERTIFICATION OF LONG-TERM CARE OMBUDSMAN:**

**A.** Under the OAA, the Department’s cabinet secretary is mandated to select the state ombudsman. In upholding this responsibility, he or she shall ensure that the state ombudsman meets minimum qualifications, which shall include, but not be limited to, demonstrated expertise in:

(1) Long-term services and supports or other direct services for older adults or individuals with disabilities;

(2) Consumer-oriented public policy advocacy;

(3) Leadership and program management skills;

(4) Negotiation and problem resolution skills; and

(5) Any other qualifications that the Department’s cabinet secretary deems necessary for the state ombudsman to fulfill his or her responsibility to assist residents of long-term care facilities in the assertion of their civil and human rights, including, but not limited to, supervisory and budget experience.

**B.** The state ombudsman certifies an individual as an ombudsman to participate in the Program, to represent the Office, and for other purposes in support of the Program. An individual may be certified as an ombudsman for limited purposes, depending on the degree of certification given and the role such individual assumes. The state ombudsman or his or her designee may undertake such investigations and require from the applicant such references as he or she reasonably deems necessary.

[9.2.19.12 NMAC – Rp, 9.2.19.12 NMAC, 9/26/17]

**9.2.19.13 ADDITIONAL REQUIREMENTS: [RESERVED]**

[9.2.19.13 NMAC – Rp, 9.2.19.13 NMAC, 9/26/17]

**9.2.19.14 ADDITIONAL CERTIFICATIONS:** The state ombudsman may create such other categories of ombudsmen and the requirements for certification thereof as he or she may decide, by filing a written procedure

describing the duties and certification requirements of such ombudsmen with the Department's cabinet secretary.  
[9.2.19.14 NMAC – Rp, 9.2.19.14 NMAC, 9/26/17]

**9.2.19.15 NOTIFICATION OF CERTIFICATION:** The state ombudsman shall send written notification of an individual's certification as an ombudsman to the individual being certified, the AAA, applicable provider agency or the private nonprofit organization, within thirty (30) days of the determination.  
[9.2.19.15 NMAC – Rp, 9.2.19.15 NMAC, 9/26/17]

**9.2.19.16 RECERTIFICATION:** Ombudsmen must be recertified each calendar year. The state ombudsman shall determine recertification requirements. As part of the recertification, the state ombudsman shall verify that the ombudsman seeking recertification has successfully:

- A. Visited his or her assigned facility or facilities regularly;
- B. Submitted regular monthly reports;
- C. Submitted appropriately written complaints;
- D. Demonstrated responsiveness to the needs and concerns of long-term care facility residents; and
- E. Demonstrated evidence of receiving appropriate continuing education.

[9.2.19.16 NMAC – Rp, 9.2.19.16 NMAC, 9/26/17]

**9.2.19.17 NON-CERTIFICATION AND DECERTIFICATION:** The state ombudsman may refuse to certify or may de-certify an individual as an ombudsman, for any of the following reasons:

- A. Failure of the individual to meet or maintain the criteria for certification set forth in Section 12, above;
- B. Existence of an un-remedied conflict of interest;
- C. Deliberate failure of the individual to disclose any conflict of interest;
- D. Violation of the confidentiality requirements of these regulations, the OAA, or the Act;
- E. Failure to provide adequate and appropriate services to long-term care residents;
- F. Falsifying records;
- G. Change in employment duties which is incompatible with those of an ombudsman;
- H. Separation from the Program, to include, for example, removal from employment by the Department or other provider agency or an extended absence not protected by state or federal law that prevents the ombudsman from fulfilling his or her job responsibilities;
- I. Failure to act in accordance with applicable federal and state laws, rules, regulations, and policies;

or

- J. Such other cause that the state ombudsman may determine would render the individual unsuitable for service as an ombudsman.

[9.2.19.17 NMAC – Rp, 9.2.19.17 NMAC, 9/26/17]

**9.2.19.18 NEW MEXICO AGING AND LONG-TERM SERVICES DEPARTMENT RESPONSIBILITIES:**

- A. Establish and operate the Office either directly or by contract or other arrangement with a public agency or nonprofit private organization, consistent with the options provided under state and federal law.
- B. The cabinet secretary of the Department shall designate who shall serve as the full-time state ombudsman.
- C. Provide for adequate legal counsel for the Office (which may be through the office of the New Mexico attorney general) on behalf of the Office or any representative of the Office against whom suit or other legal action is brought or threatened to be brought in connection with the performance of the official duties of the Office or of such representative.
- D. Provide support to the state ombudsman to enable him or her to fulfill responsibilities consistent with all applicable federal and state laws, regulations, and policies.
- E. Administer any Program service contracts between the Department, AAAs, provider agencies or private nonprofit organizations.
- F. Administer the Program in accordance with all applicable federal and state laws, regulations, and policies;
- G. Pursuant to 45 CFR 1324.13, determine the use of fiscal resources appropriated or otherwise available for the operation of the Office. The state ombudsman shall determine that Program budgets and expenditures of the Office and local ombudsman entities are consistent with laws, policies and procedures governing

the Program.

**H.** Develop and provide final approval of an annual report as set forth in section 712(h)(1) of the OAA. Such report shall:

- (1) Describe the activities carried out by the Office in the year for which the report is prepared;
- (2) Contain analysis of Program data;
- (3) Describe evaluation of the problems experienced by, and the complaints made by or on behalf of, residents;
- (4) Contain policy, regulatory and legislative recommendations for improving the quality of care and life of the residents; protecting the health, safety, welfare and rights of the residents; and resolving resident complaints and identified problems or barriers;
- (5) Contain analysis of the success of the Program, including success in providing services to residents of assisted living, board and care facilities and other similar adult care facilities; and
- (6) Describe barriers that prevent the optimal operation of the Program.

**I.** Establish mechanisms to ensure the Program is performing all of the functions, responsibilities and duties set forth in Section 22, as well as action steps as required in the event these functions are not performed. Although the Program is both independent and autonomous, 45 CFR 1324.15 specifically grants the Department the responsibility to monitor the performance of all programs and activities of the Office for quality and effectiveness.

**J.** Pursuant to 45 CFR 1324.15, Provide personnel supervision and management for the state ombudsman and representatives of the Office who are employees of the Department. Such management shall include an assessment of whether the Office is performing all of its functions under the OAA and the Act.

**K.** Provide monitoring, as required by 45 CFR 1324.15(b), including but not limited to fiscal monitoring, where the Office or local ombudsman entity is located within an agency or private nonprofit organization with the Department. Such monitoring shall include an assessment of whether the Program is performing all of the functions, responsibilities and duties set forth in 45 CFR 1324.13 and 1324.19. Further, the Department shall make reasonable requests of reports, including aggregated data regarding Program activities, to meet the requirements of this provisions.

**L.** Ensure that any review of files, records or other information maintained by the Program is consistent with the disclosure limitations set forth in 45 CFR 1324.11(e)(3) and 45 CFR 1324.13(e) as well as state law.

[9.2.19.18 NMAC – Rp, 9.2.19.18 NMAC, 9/26/17]

**9.2.19.19 LONG-TERM CARE OMBUDSMAN RESPONSIBILITIES: [RESERVED]**

[9.2.19.19 NMAC – Rp, 9.2.19.19 NMAC, 9/26/17]

**9.2.19.20 AREA AGENCY ON AGING RESPONSIBILITIES: [RESERVED]**

[9.2.19.20 NMAC – Rp, 9.2.19.20 NMAC, 9/26/17]

**9.2.19.21 PROVIDER AGENCY RESPONSIBILITIES: [RESERVED]**

[9.2.19.21 NMAC – Rp, 9.2.19.21 NMAC, 9/26/17]

**9.2.19.22 STATE LONG-TERM CARE OMBUDSMAN RESPONSIBILITIES:**

- A.** Adhere to the rules of confidentiality and propriety set forth in these regulations and in the resource manual for new volunteer training, if applicable;
- B.** Protect access to ombudsman records, in accordance with Sections 36 through 38 of this rule;
- C.** Carry out other activities that the state ombudsman reasonably deems appropriate to the certification of ombudsmen;
- D.** Perform each responsibility in accordance with all applicable federal and state law, rules, regulations, and policies;
- E.** Analyze, comment on, and monitor the development and implementation of federal, state and local laws, regulations and other governmental policies and actions that pertain to the health, safety, welfare and rights of residents with respect to the adequacy of long-term care facilities and seniors in the state;
- F.** Recommend any changes in such laws, regulations, policies, and actions as the Office determines to be appropriate;
- G.** Facilitate public comment on the laws, regulations, policies, and actions;

**H.** Provide leadership to statewide systems advocacy efforts of the Office on behalf of long-term care facility residents, including coordination of systems advocacy efforts carried out by representatives of the Office;

**I.** Provide information to public and private agencies, legislators, the media, and other persons, regarding the problems and concerns of residents and recommendations related to the problems and concerns; and

**J.** Establish policies and procedures for the Office, in consultation with the Department, to carry out the Program in accordance with the OAA. In accordance with 45 CFR 1324.11 (e), such policies and procedures regarding Program administration must include, but not be limited to:

(1) A requirement that the Department or any agency or private nonprofit organization provide specific exemptions to ombudsmen, staff and volunteers from any requirements that prohibit ombudsmen from performing functions and responsibilities of the ombudsmen, as set forth in 45 CFR 1324.13 or from adhering to the requirements of Section 712 of the OAA, including that:

(a) The Department or any agency or nonprofit organization provide exemptions to its internal policies and procedures which prohibit any ombudsman from performing the functions and responsibilities of an ombudsman; provided, however, that nothing in this provision shall prohibit the Department from requiring that the state ombudsman, or other employees or volunteers of the Office, adhere to all other policies and procedures of the Department;

(b) The state ombudsman monitor the performance of local ombudsman entities which the state ombudsman has designated to carry out the duties of the Office; and

(c) The process by which the agencies hosting local ombudsman entities will coordinate with the state ombudsman in the employment or appointment of representatives of the Office.

(2) Standards to assure prompt response to complaints by the Office which prioritize abuse, neglect, exploitation and time-sensitive complaints and which consider the severity of the risk to the resident, the imminence of the threat of harm to the resident, and the opportunity for mitigating harm to the resident through the provision of Program services;

(3) Procedures for access to facilities, residents, and appropriate records, to include:

(a) Access to enter all long-term care facilities at any time during a facility's regular business hours or regular visiting hours, and at any other time when access may be required by the circumstances to be investigated;

(b) Access to all residents to perform the functions and duties set forth in 45 CFR 1324.13 and 1324.19;

(c) Access to the name and contact information of the surrogate decision maker, if any, where needed to perform the functions and duties as set forth in 45 CFR 1324.13 and 1324.19;

(d) Access to review resident records provided:

(i) The resident or surrogate decision maker communicates informed consent to the access and the consent is given in writing or through the use of auxiliary aids and services;

(ii) The resident or surrogate decision maker communicates informed consent orally, visually or through the use of auxiliary aids and services, and such consent is documented contemporaneously by a representative of the Office in accordance with Program procedures; and

(iii) Access is necessary in order to investigate a complaint, including one of abuse, neglect or exploitation, the surrogate decision maker refuses to consent to the access, a representative of the Office has reasonable cause to believe that the resident representative is not acting in the best interests of the resident, and the representative of the Office obtains approval of the state ombudsman; and

(e) Access to the administrative records, policies and documents, to which the residents have, or the general public has access, of long-term care facilities;

(f) Access of the state ombudsman to, upon request, copies of all licensing and certification records maintained by the state with respect to long-term care facilities.

(4) Reaffirmation that the Health Insurance Portability and Accountability Act of 1996 Privacy Rule, 45 CFR 160 and 45 CFR 164, subparts A and E, does not preclude release by long-term care facilities of resident private health information or other resident identifying information to the Office or any representative of the Office, including but not limited to residents' medical, social, or other records, a list of resident names and room numbers, or information collected in the course of a state or federal survey or inspection process.

(5) Policies and procedures regarding disclosure of files, records and other information maintained by the Program must include, but not be limited to:

(a) Provision that the files, records and information maintained by the Program

may be disclosed only at the discretion of the state ombudsman or designee for such purpose and in accordance with the criteria developed by the Program, as required by 45 CFR 1324.13(e).

**(b)** Prohibition of the disclosure of identifying information of any resident with respect to whom the Program maintains files, records or information except as otherwise provided by CFR 1324.19(b)(5) through (8), unless:

**(i)** The resident or surrogate decision maker communicates informed consent to the disclosure and the consent is given in writing or through the use of auxiliary aides and services;

**(ii)** The resident or surrogate decision maker communicates informed consent orally, visually, or through the use of auxiliary aids and services and such consent is documented contemporaneously by a representative of the Office in accordance with such procedures; or

**(iii)** The disclosure is required by court order;

**(c)** Prohibition of the disclosure of identifying information of any complainant with respect to whom the Program maintains files, records or information, unless:

**(i)** The complainant communicates informed consent to the disclosure and the consent is given in writing or through the use of auxiliary aids and services;

**(ii)** The complainant communicates informed consent orally, visually or through the use of auxiliary aides and services and such consent is documented contemporaneously by a representative of the Office in accordance with such procedures; or

**(iii)** The disclosure is required by court order;

**(d)** Exclusion of the ombudsman and representatives of the Office from abuse reporting requirements, including when such reporting would disclose identifying information of a complainant or resident without appropriate consent or court order, except as otherwise provided in 45 CFR 1324.19(b)(5) though (8).

**(e)** Policies and procedures regarding conflicts of interest must establish mechanisms to identify and remove or remedy conflicts of interest as provided in 45 CFR 1324.21, including:

**a.** Requiring that other agencies in which the Office or local ombudsman entities are organizationally located have policies in place to prohibit the employment or appointment of an ombudsman or representatives of the Office with a conflict that cannot be adequately removed or remedied;

**a.** Requiring that the state ombudsman take reasonable steps to refuse, suspend or remove designation of an individual who has a conflict of interest, or who has a member of the immediate family with a conflict of interest, which cannot be adequately removed or remedied;

**b.** Establishing the methods by which the Office and the Department periodically review and identify conflicts of the state ombudsman and representatives of the Office; and

**c.** Establishing the actions the Office and/or State agency will require the Ombudsman or representatives of the Office to take in order to remedy or remove such conflicts.

**(ii)** Ensuring that no individual, or member of the immediate family of an individual, involved in the employment or appointment of the state ombudsman is subject to a conflict of interest;

**(iii)** Policies and procedures related to systems advocacy must assure that **a.** the Office is required and has sufficient authority to carry out its responsibility to analyze, comment on, and monitor the development and implementation of federal, state, and local laws, regulations, and other government policies and actions that pertain to long-term care facilities and services and to the health, safety, welfare, and rights of residents, and to recommend any changes in such laws, regulations, and policies as the Office determines to be appropriate.

**b.** Such procedures must exclude the state ombudsman and representatives of the Office from any state lobbying prohibitions to the extent that such requirements are inconsistent with section 712 of the OAA. Nothing in this section shall prohibit the state ombudsman or the Department or other agency or private nonprofit organization in which the Office is organizationally located from establishing policies which promote consultation regarding the determinations of the Office related to recommended changes in laws, regulations, and policies. However, such a policy shall not require a right to review or pre-approve positions or communications of the Office. That being said, such communication is strongly encouraged as per the OAA.

**(iv)** Policies and procedures related to designation must

establish the criteria and process by which the state ombudsman shall designate and refuse, suspend or remove designation of local ombudsman entities and representatives of the Office.

(v) Such criteria should include, but not be limited to, the authority to refuse, suspend or remove designation of a local ombudsman entity or representative of the Office in situations in which an identified conflict of interest cannot be adequately removed or remedied as set forth in 45 CFR 1324.21.

(6) Policies and procedures related to grievances must establish a grievance process for the receipt and review of grievances regarding the determinations or actions of the state ombudsman and representatives of the Office. Such process shall include an opportunity for reconsideration of the state ombudsman decision to refuse, suspend, or remove designation of a local ombudsman entity or representative of the Office. Notwithstanding the grievance process, the state ombudsman shall make the final determination to designate or to refuse, suspend, or remove designation of a local ombudsman entity or representative of the Office.

(7) Policies and procedures related to the determinations of the Office must ensure that the state ombudsman, as head of the Office, shall be able to independently make determinations and establish positions of the Office, without necessarily representing the determinations or positions of the Department or other agency or private nonprofit organization in which the Office is organizationally located, regarding:

(a) Disclosure of information maintained by the Program within the limitations set forth in section 712(d) of the OAA;

(b) Recommendations to changes in federal, state and local laws, regulations, policies and actions pertaining to the health, safety, welfare, and rights of residents; and

(c) Provision of information to public and private agencies, legislators, the media, and other persons, regarding the problems and concerns of residents and recommendations related to the problems and concerns.

**K.** Pursuant 45 CFR 1324.13(h), through the adoption of memoranda of understanding and other means, the state ombudsman shall lead state-level coordination and support appropriate local ombudsman entity coordination, between the Program and other entities with responsibilities relevant to the health, safety, well-being or rights of residents of long-term care facilities including, but not limited to:

- 1) AAA programs;
- 2) Aging and disability resource centers;
- 3) Adult protective services programs;
- 4) Protection and advocacy systems, as designated by the state, and as established under the Developmental Disabilities Assistance and Bill of Rights Act of 2000 (42 USC 15001 et seq.);
- 5) Facility and long-term care licensure and certification programs;
- 6) The state Medicaid fraud control unit, as defined in Section 1903(q) of the Social Security Act (42 USC 1396b(q));
- 7) Victim assistance programs;
- 8) State and local law enforcement agencies;
- 9) Courts of competent jurisdiction; and
- 10) The state legal assistance developer and legal assistance programs, including those provided under Section 306(a)(2)(C) of the OAA.

**L.** The state ombudsman and representatives of the Office assist residents in seeking administrative, legal and other appropriate remedies. In so doing, the state ombudsman shall coordinate with the legal services developer, legal services providers, and victim assistance services to promote the availability of legal counsel to residents.

[9.2.19.22 NMAC – Rp, 9.2.19.22 NMAC, 9/26/17]

**9.2.19.23 to 9.2.19.25 [RESERVED]**

[9.2.19.23 NMAC – Rp, 9.2.19.25 NMAC, 9/26/17]

**9.2.19.26 CONFLICTS OF INTEREST POLICY:** The organizational placement of the Program and the individuals who carry out the duties of the Program must be free from conflicts of interest.

[9.2.19.26 NMAC – Rp, 9.2.19.26 NMAC, 9/26/17]

**9.2.19.27 CONFLICT OF INTEREST IDENTIFICATION:** A conflict of interest exists in the Program or with respect to an individual providing Program services when other interests intrude upon, interfere with, or threaten to negate the ability of the Program to advocate without compromise on behalf of long-term care facility

residents. Types of conflict of interest include: conflicts of loyalty where incentives, often related to financial or employment considerations, shape one's judgment or behavior in ways that are contrary to the interest of residents; conflicts of commitment where goals or obligations that direct one's time or attention away from the interest of residents; and conflicts of control where limitations or restrictions are imposed that effectively foreclose one's ability to take actions to advocate for the interest of residents.

[9.2.19.27 NMAC – Rp, 9.2.19.27 NMAC, 9/26/17]

**9.2.19.28 ORGANIZATIONAL CONFLICTS:** An organizational conflict may arise when Program placement is made in an agency which has not identified and taken steps to remove or remedy conflicts of interest between the Office and the state agency and notified the assistant secretary of the federal Health and Human Services Department of its plan for removing the conflict, pursuant to 45 CFR 1324.21(b)(1). An organizational conflict of interest exists where the Office:

- A.** Has an ownership or investment interest (represented by equity, debt, or other financial relationship) in a long-term care facility or a long-term care service;
- B.** Provides long-term care services, including the provision of personnel for long-term care facilities or the operation of programs that control services for or residents' access to long-term care facilities;
- C.** Has governing board members with ownership, investment or employment interest in long-term care facilities; or
- D.** Has direct involvement in the licensing or certification of a long-term care facility or long-term care services.

[9.2.19.28 NMAC – Rp, 9.2.19.28 NMAC, 9/26/17]

**9.2.19.29 INDIVIDUAL OMBUDSMAN CONFLICTS:** Conflicts for any ombudsman, including the state ombudsman, staff and volunteers, include, but are not limited to, the following:

- A.** Employment of the individual by a long-term care facility in the state or by the owner or operator of any long-term care facility in the state within one (1) year before the date the determination is being made;
- B.** Participation in the management of a long-term care facility by the individual or a member of his or her immediate family or household within one (1) year before the date the determination is being made. For purposes of this paragraph, "household" means all persons residing at a single dwelling and contributing to the household income;
- C.** Ownership or investment interest (represented by equity, debt, or other financial relationship) in an existing or proposed long-term care facility or long-term care service by the individual or a member of his or her immediate family;
- D.** Involvement in the licensing or certification of a long-term care facility or provision of a long-term care service by the individual or a member of his or her immediate family;
- E.** Receipt of remuneration (in cash or in kind) under a compensation arrangement with an owner or operator of a long-term care facility by the individual or to the individual through a member of his or her immediate family;
- F.** Accepting any gifts or gratuities from a long-term care facility or resident or resident representative; an ombudsman must adequately compensate a facility for food provided by the facility with the exception of courtesy beverages and sample portions of food tested as part of an investigative process;
- G.** Accepting money or any other consideration from anyone other than the provider agency or other entity designated by the Office for the performance of an act in the regular course of an ombudsman's duties;
- H.** Having management responsibility for, or operating under the supervision of an individual with management responsibility for, adult protective services;
- I.** Serving as a surrogate decision maker or in another fiduciary capacity for residents of long-term care facilities in an official capacity (as opposed to serving as a guardian or fiduciary for a family member, in a personal capacity).
- J.** Provision of services with conflicting responsibilities while serving as an ombudsman; or
- K.** Otherwise participating in activities which negatively impact on the ability of the ombudsman to serve residents, or are likely to create a perception that the ombudsman's primary interest is other than as a resident advocate.

[9.2.19.29 NMAC – Rp, 9.2.19.29 NMAC, 9/26/17]

**9.2.19.30 EXCEPTION FOR PUBLICLY TRADED POOLED INVESTMENTS:** Notwithstanding the foregoing provisions of Section 31, below, ownership of shares in a mutual fund or other publicly traded pooled

investment fund whose assets may include publicly traded securities of long-term care facilities or service organizations shall not generally constitute a conflict of interest, unless the investments of such fund is limited to such facilities or service organizations, or such investments normally form a large percentage of such fund.  
[9.2.19.30 NMAC – Rp, 9.2.19.30 NMAC, 9/26/17]

**9.2.19.31 REPORTING POTENTIAL CONFLICT:**

**A.** All ombudsmen and agents of the AAAs, provider agencies and private nonprofit organizations shall notify the Department’s cabinet secretary of any actual or potential conflict of interest within the Program of which they have knowledge.

**B.** The state ombudsman shall determine whether the situation rises to the level of a conflict and, if so, whether appropriate actions must be taken to sufficiently remedy the conflict. A conflict can be sufficiently remedied only where the existence of the conflict does not interfere with any duties of the Program, and where the conflict is not likely to alter the perception of the Program as an independent advocate for residents.  
[9.2.19.31 NMAC – Rp, 9.2.19.31 NMAC, 9/26/17]

**9.2.19.32 REMEDYING ORGANIZATIONAL CONFLICT:**

**A.** An organization (with the exception of the Department, which steps for remedying any perceived conflict are set forth in section 28) within which the conflict has been identified shall submit to the state ombudsman a written remedial plan within thirty (30) calendar days of identification of the conflict to the Office. The remedial plan must identify the conflict and provide assurances that minimize to the greatest extent possible the negative impact of the conflict on the Program. Examples of such assurances may include:

- (1) The Program will investigate complaints in an unbiased manner and independently determine actions to be taken in their resolution; or
- (2) No provider agency employee or governing board member with a conflict of interest will be involved with or influence any decision to hire or terminate the employment of an ombudsman.
- (3) Governing board members of the provider agency, AAA or private nonprofit entity who have a conflict of interest:
  - (a) Must disclose the conflict to the governing board and to the state ombudsman;
  - (b) May have no involvement with ombudsman activities concerning the entity which is the source of the conflict; and
  - (c) Must abstain from voting on issues related to the operation of the Program.
- (4) The provider agency’s policies and procedures adequately set forth procedures to remedy conflicts of interest and ensure that the ombudsmen fulfill their duties without interference.
- (5) A memorandum of agreement exists between the Program and another program which provides services with conflicting responsibilities. Such a memorandum must adequately set forth the roles, responsibilities, and appropriate working relationships of the respective programs.

[9.2.19.32 NMAC – Rp, 9.2.19.32 NMAC, 9/26/17]

**9.2.19.33 REMEDYING INDIVIDUAL OMBUDSMAN CONFLICTS:** Where individual conflicts have been identified, the following steps shall be taken where the conflict may be sufficiently remedied:

**A.** Where the individual is an applicant for certification as an ombudsman, a written plan shall be developed, submitted to the state ombudsman and agreed upon before the individual takes any actions on behalf of the Program;

**B.** Where the individual is already an ombudsman, a written plan shall be developed, submitted to the state ombudsman and agreed upon within thirty (30) calendar days of identification of the conflict to the state ombudsman;

**C.** The remedial plan must identify the conflict and provide assurances to minimize to the greatest extent possible the negative impact of the conflict on the Program, which may include a prohibition of the ombudsman with a conflict of interest from serving the residents of the facility with which he or she has a conflict and arranging for another ombudsman to serve those residents. Where appropriate, this arrangement may be time-limited.

**D.** The remedial plan must be mutually agreed upon and signed by the ombudsman or applicant with the conflict of interest, and the state ombudsman.

[9.2.19.33 NMAC – Rp, 9.2.19.33 NMAC, 9/26/17]

**9.2.19.34 PROCEDURES TO AVOID CONFLICTS OF INTEREST:**

**A.** All persons seeking certification as ombudsman shall disclose to state ombudsman all information relevant to past employment, membership, or interests that may affect, or could reasonably be expected to affect, that individual's ability to carry out duties of an ombudsman without conflicting interest.

**B.** In order to avoid confusion and possible conflicts between the Program and other Department personnel in communicating with the press, broadcast media and other public media, the state ombudsman or his or her representative are encouraged to apprise and summarize the intended communication for the cabinet secretary or public information officer prior to any such communication or other dissemination or release of public information from or concerning the Program, provided that neither the cabinet secretary nor public information officer has an individual conflict, as set forth, above.

[9.2.19.34 NMAC – Rp, 9.2.19.34 NMAC, 9/26/17]

**9.2.19.35 FAILURE TO IDENTIFY OR REMEDY A CONFLICT OF INTEREST:**

**A.** Failure on the part of an ombudsman or provider agency to identify and report to the state ombudsman a known conflict of interest shall be sufficient grounds for refusal to designate or for de-designation of the provider agency or for refusal to certify or for de-certification of the ombudsman.

**B.** Existence of an un-remedied conflict of interest shall be sufficient grounds for the de-designation of a provider agency or de-certification of an ombudsman.

**C.** Failure on the part of an ombudsman to identify and report to the state ombudsman a known conflict of interest shall be sufficient grounds for the de-certification of the ombudsman.

[9.2.19.35 NMAC – Rp, 9.2.19.35 NMAC, 9/26/17]

**9.2.19.36 LONG-TERM CARE OMBUDSMAN RECORDS POLICY:** Records of the Program shall be confidential and may be disclosed only in limited circumstances specifically provided by applicable law and these regulations.

[9.2.19.36 NMAC – Rp, 9.2.19.36 NMAC, 9/26/17]

**9.2.19.37 ACCESS TO LONG-TERM CARE OMBUDSMAN RECORDS:**

**A.** All Program client records are the property of the Office. The state ombudsman or designee shall have access to all Program records at all times for any lawful purpose.

**B.** Ombudsmen are permitted access to such records as may be necessary to discharge their responsibilities in complaint processing or other responsibilities under these regulations.

**C.** All records of another agency participating in the Joint Protocol established under the provisions of NMSA 1978 Section 24-1-5(L) that may come into the possession of the Program and that include identifying or otherwise confidential resident or complainant information shall be held and disclosed in the same manner as Program records hereunder, except to the extent that such other agency imposes stricter requirements or restrictions for disclosure, to which extent the rules of such other agency shall be observed to the extent permitted by law.

**D.** All information concerning residents or complainants shall be handled with the utmost care and discretion. No ombudsman shall disclose any information or record that includes, implies or describes the identity of any complainant or resident about whom the office maintains files or records unless:

(1) The complainant or resident or his or her surrogate decision maker consent in writing to the disclosure;

(2) The complainant or resident gives informed consent, which is documented immediately in writing by an ombudsman;

(3) Disclosure is necessary for the provision of services to the resident or the resident is unable to provide informed consent; or

(4) Disclosure is ordered by a court of competent jurisdiction.

[9.2.19.37 NMAC – Rp, 9.2.19.37 NMAC, 9/26/17]

**9.2.19.38 PROCEDURE FOR RELEASE:**

**A.** Records maintained by the Program may not be released, disclosed, duplicated, or removed to anyone who is not an ombudsman without the written permission of the state ombudsman. All requests made for ombudsman records shall be referred to the state ombudsman or designee.

**B.** The state ombudsman or designee shall determine whether to disclose all or part of the records as follows:

(1) The state ombudsman shall require that the request be made in writing and may require a copy of the request before determining the appropriate response. Where the request is made orally by a resident, complainant, or surrogate decision maker of the resident or complainant, the request must be documented immediately and filed as an ombudsman record by the ombudsman to whom informed consent was communicated in order to meet this requirement.

(2) The state ombudsman shall review the request to determine whether the release of all or part of the records would be consistent with the wishes or interest of the relevant resident(s).

(3) The state ombudsman shall notify the Department's cabinet secretary and the state ombudsman's immediate supervisor (if the immediate supervisor is someone other than the cabinet secretary) of any public media request for records within 24 hours of the request.

(4) The state ombudsman or designee shall refer any request made by formal legal process to the Program's legal counsel. The state ombudsman shall be responsible to ensure that a response is timely filed and endeavor to prevent any release that would be inconsistent with the interests of the resident(s).

(5) Any request for information made under the state Inspection of Public Records Act (IPRA) directly to the Program shall be forwarded to the Department's records custodian within 24 hours. The Department's records custodian shall respond in writing within 15 days to the requestor after consulting with the state ombudsman and the Department's general counsel or designee. The Department's general counsel or designee shall make the final decision whether to disclose records in response to an IPRA request, keeping in mind that Program records are not public records and are therefore exempt from IPRA. Notwithstanding the foregoing, the state ombudsman may release records provided they do not name or provide personally identifying information of residents or complainants as it deems appropriate, provided such disclosure is not made pursuant to an IPRA request.  
[9.2.19.38 NMAC – Rp, 9.2.19.38 NMAC, 9/26/17]

**9.2.19.39 LEGAL COUNSEL: [RESERVED]**

[9.2.19.39 NMAC – Rp, 9.2.19.39 NMAC, 9/26/17]

**9.2.19.40 LEGAL COUNSEL:**

A. Pursuant to 45 CFR 1324.15 (j), The Department shall ensure that:

(1) Legal counsel for the Program is adequate, available, has competencies relevant to the legal needs of the Program and of the residents, and is without conflict of interest, in order to:

(a) Provide consultation and representation as needed in order for the Program to protect the health, safety, welfare and rights of residents; and

(b) Provide consultation or representation as needed to assist the state ombudsman and representatives of the Office in the performance of their official functions, responsibilities and duties, including complaint resolution and advocacy; and

(2) Legal representation, arranged by or with the approval of the state ombudsman, is provided to the state ombudsman or any representative of the Office against whom suit or other legal action is brought or threatened to be brought in connect with the performance of the official duties.

(3) Legal representation of the Program by the state ombudsman or representative of the Office who is a licensed attorney shall not by itself constitute sufficiently adequate legal counsel.

(4) The communications between the state ombudsman and legal counsel are subject to attorney-client privilege.

[9.2.19.40 NMAC – Rp, 9.2.19.40 NMAC, 9/26/17]

**9.2.19.41 ANONYMOUS EVALUATIONS:**

A. Chapter 28, Articles 7 and 17 of the NMSA 1978 authorize and direct the Department and the Office to protect the health, safety, welfare and rights of the aged and other residents of long-term care facilities in this state, to investigate and resolve complaints of such residents, and to report on conditions of long-term care facilities. NMSA 1978 Section 28-4-6(C) specifically provides that the Department may conduct unannounced evaluations of long-term care facilities by the use of undercover residents or employees. Pursuant to its authority as the parent agency of the Office, the Department may carry out such evaluations by and through the Office; however, under no circumstances shall federal funding be used for such anonymous evaluations.

B. The Department shall conduct all undercover evaluations authorized by NMSA 1978 Section 28-4-6(C) in accordance with its Procedures for the Conduct of Anonymous Evaluations of Long-Term Care Facilities adopted pursuant to such authority and in consultation with the Department's cabinet secretary.

[9.2.19.41 NMAC – Rp, 9.2.19.41 NMAC, 9/26/17]

**HISTORY OF 9.2.19 NMAC:**

Pre-NMAC History: The material in this Part was derived from that previously filed with the state records center: [Reserved] 01-02, Long-Term Care Ombudsman, 2/1/2001.

History of Repealed Material: 9.2.19 NMAC, Long-Term Care Ombudsman, filed 2/1/2001. Repealed effective 9/26/17.