NEW YORK STATE OFFICE FOR THE AGING
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David A. Paterson, Governor Michael Burgess, Director
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PROGRAM INSTRUCTION	**Number 10-PI-13**
	Supersedes
	Expiration Date

DATE: September 21, 2010

TO: LTCOP Coordinators

SUBJECT: Ombudsman Participation on an Ethics Review Committee

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PURPOSE: This program instruction is intended to provide guidance with regard to a long term care ombudsman participating on an ethics review committee established by a facility in compliance with the Family Health Care Decisions Act.

BACKGROUND: The Family Health Care Decisions Act, set forth in Public Health Law ("PHL") Article 29-cc, became effective on June 1, 2010. Section 2994-m of the Public Health Law requires the establishment of an ethics review committee by each hospital and residential health care facility. Alternatively, a hospital or residential health care facility may participate in an ethics review committee that serves more than one facility. The ethics review committee is charged with considering and responding to any health care matter presented by a person connected with the case. The phrase "person connected with the case" is defined as "the patient, any person on the surrogates list, a parent or guardian of a minor patient, the hospital administrator, an attending physician, any other health or social services practitioner who is or has been directly involved in the patient's care and any duly authorized state agency, including the facility director for a patient transferred from a correctional facility."

The ethics review committee is a review body. It does not establish facility policy. The recommendations and advice of the ethics review committee, with two exceptions, is

advisory and non-binding. These exceptions are: 1) a decision to withhold life sustaining treatment by a surrogate decision-maker to which the attending physician disagrees may not be implemented until the ethics review committee, including at least one physician not directly responsible for the patient's care (or a court of competent jurisdiction) reviews and determines that the decision meets the standards or; 2) a situation in which an emancipated minor wants to have life-sustaining treatment withheld or withdrawn.

Committee membership (PHL §2994-m[3]) requires the ethics review committee to be an interdisciplinary committee composed of at least five members "who have demonstrated an interest in or commitment to patient's rights or to the medical, public health or social needs of those who are ill." At least three ethics review committee members must be health or social services practitioners, at least one of whom must be a registered nurse and one of whom is a physician. At least one member of the committee must be a person without any governance, employment or contractual relationship with the facility. A residential health care facility must offer the residents' council of the facility the opportunity to appoint up to two people who have expertise in or a demonstrated commitment to patient's rights or to the care and treatment of the elderly or nursing home residents through professional or community activities. The committee members may not be residents of the facility or a family member of a resident.

Understandably, a facility may propose to have the ombudsman serve as an ethics review committee member or the facility's residents' council might nominate the ombudsman. However, due to the many potential conflicts between an ethics review committee and the Ombudsman Program, having an ombudsman serve on an ethics review committee is not in the best interest of the residents. Some examples of the potential conflicts are as follows: 1) A resident disagrees with the ethics review committee's recommendation(s) and then asks an ombudsman who sat on the ethics review committee for assistance; 2) An ombudsman serving on an ethics review committee notes that the committee does not follow proper procedures and is then unable to report the transgression, based on confidentiality requirements under the Family Health Care Decisions Act.

Under the Family Health Care Decisions Act, ethics review committee members are bound by confidentiality requirements that do not allow the committee members to reveal any information about the committee's discussions or practices. As a result, an ombudsman who serves on an ethics review committee cannot effectively advocate on behalf of a resident whose medical care is the focus of the committee's discussions because that ombudsman would be bound by the committee's confidentiality requirements and would not be able to reveal any information about the committee's discussions or procedures. Even having an ombudsman serve as a member of the ethics review committee for a facility not covered by that particular ombudsman is problematic in that if the resident disputes the ethics review committee's findings there

is the potential that a local ombudsman program would be investigating a complaint against a committee of which an ombudsman from the same local office is a member.

Conclusion

An ombudsman may not be directly involved in making health care decisions on behalf of a resident beyond protecting the resident's rights to be informed and to participate in directing his or her own care to the fullest extent possible. If asked by a resident or an interested party, including the legal representative of a resident, an ombudsman may accompany a resident to an ethics review committee meeting and may advocate on behalf of a resident with respect to the resident's dealings with the ethics review committee. **However, an ombudsman may not serve as a member of an ethics review committee for any facility located within New York State.**

PROGRAMS AFFECTED:

		☐ Title III-B	☐ Title III-C-1	☐Title III-C-2
☐ Title III-D	☐ Title III-E	☐ CSE	☐ SNAP	☐ Energy
☐ EISEP	☐ NSIP	☐ Title V	☐ HIICAP	x LTCOP
☐ Other:				

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