



March 28, 2012

The Honorable Vicki Schmidt, Chair
Public Health and Welfare Committee
Kansas State Capitol
300 SW 10th St.
Topeka, KS 66612

Re: State Long-Term Care Ombudsman Appointment Testimony

Dear Senator Schmidt:

On behalf of the more than 28,000 residents and their families who live in Kansas' nursing homes, I am asking that you carefully weigh Governor Brownback's appointment of Ms. Barbara Hickert to the position of State Long-Term Care Ombudsman.

The appointment of a nursing home executive as the State Ombudsman would be analogous to putting Lehman Brothers executives at the helm of the Securities Exchange Commission. Except in this instance, we're not talking about pension protection and the housing bubble, we are talking about safeguarding the very lives of our parents and grandparents from abuse and neglect.

Now, don't get me wrong.

Governor Brownback's appointee is a respected professional whose nursing home has a nearly impeccable regulatory record. Nothing should be taken away from her commendable accomplishments. In fact, our nation needs more nursing home administrators that share her determination in providing outstanding care and life for residents.

Rather this appointment is about conflicts of interest and how they violate the spirit, if not the letter, of the Older Americans Act and Kansas statutes.

As you know, the Office of State Long-Term Care Ombudsman is a federal and state mandated program that conducts individual and systemic advocacy on behalf of residents who live in nursing homes and other long-term care settings.

The Ombudsman serves as the residents' "first advocate" and is charged to be an industry watchdog who is steadfast in representing residents' concerns to lawmakers, agencies, corporations, and facilities—anyone who may have an involvement in protecting residents from abuse and neglect.

Laws ensure that the program operates without interference or conflict.

The Institute of Medicine's landmark study of the Long-Term Care Ombudsman Program (*Real People, Real Problems*) goes so far to assert that **even a perceived conflict of interest is a "significant problem."**

The study concludes that any existence of conflicts may be disastrous inasmuch that *"the resident, even more than the program, may suffer. The resident's problem may not be resolved, certain avenues of resolution may be foreclosed, the resident's voice may not be heard by policymakers, and the resident's interests will be inadequately represented or altogether absent from the table at which public policy is made."*

That is why this appointment needs to be seriously vetted for conflicts.

For starters, the Older Americans Act mandates that the State Ombudsman *"does not have an ownership or investment interest"* in a long-term care facility or service. This may include stock options, retirement benefits or other remuneration.

The State Ombudsman appointee should fully disclose his/her financial status to the Public Health and Welfare Committee so members can determine if there are any pecuniary conflicts.

This appointment also raises concerns about a conflict of loyalty.

It is plausible that previous personal and professional relationships may bias a former nursing home executive toward operator's interests in lieu of resident safety and care. A nursing home executive, steeped in industry culture, may have the tendency to examine issues through a "provider lens" instead of viewing problems from the residents' perspective.

This jeopardizes the program's integrity and may result in residents losing confidence in the State Ombudsman to faithfully advocate for their concerns.

A recent *New York Times* article regarding the abrupt dismissal of New York's Medicaid Inspector General understates this issue and the importance of the State Ombudsman appointment (<http://nyti.ms/GAL30a>).

According to the *Times*, the Inspector General (who was tough on health care fraud and recouped billions of stolen taxpayer dollars) was replaced with a "provider-friendly" auditor.

By all appearances, Governor Cuomo appointed the new inspector to *"collaborate"* with providers in changing auditing methods to be *"less adversarial"* so everyone *"can agree."*

As one advocate aptly stated, *"asking the regulator and the regulated party to sit down and come to some sort of consensus on how the regulation should be makes no sense."*

And this is exactly what residents and families may be getting with an industry executive as their State Ombudsman, someone who sits down and will negotiate from the industry's standpoint instead of the residents' perspective.

The appointment of an industry-friendly bureaucrat in the name of "getting along" may result in downplaying provider accountability. This is nothing more than nursing home deregulation through practice and circumvents the legislative process.

That's why this critical ombudsman appointment shouldn't be decided upon whether regulators and operators should play nicely in the sandbox together. Instead, it should focus on who will best serve residents in safeguarding their health, safety and welfare for years to come.

Residents already have enough working against them in broken regulatory systems, lobbyists with seemingly unlimited financial resources, and corporate lawyers who make it difficult for residents to seek civil justice in cases of abuse or neglect.

Handing the keys of the Ombudsman Office to the nursing home industry will only further stall resident advocacy.

Finally, if there are any conflicts of interest, state law mandates that *"no person shall be eligible to be appointed to, or to hold, the office of state long-term care ombudsman if such person is subject to a conflict of interest."*

So let's get this one right for elderly and disabled residents by appointing an ombudsman who residents and their families can look to and confidently state, **"The State Ombudsman has our back."**

Thank you for your consideration.

Yours in service,



Brian Lee, *Executive Director*
Families for Better Care