

A-Engrossed
Senate Bill 239

Ordered by the Senate March 20
Including Senate Amendments dated March 20

Printed pursuant to Senate Interim Rule 213.28 by order of the President of the Senate in conformance with pre-session filing rules, indicating neither advocacy nor opposition on the part of the President (at the request of Senate Interim Committee on Human Services and Early Childhood)

SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure.

Establishes process to determine consent of resident of residential care facility or adult foster home to individually based limitation of certain rights.

Takes effect on 91st day following adjournment sine die.

A BILL FOR AN ACT

Relating to consent to individually based limitations; and prescribing an effective date.

Be It Enacted by the People of the State of Oregon:

SECTION 1. Section 2 of this 2017 Act is added to and made a part of ORS 443.400 to 443.455.

SECTION 2. (1) If a resident of a residential care facility, including but not limited to an assisted living facility licensed to serve seniors and people with physical disabilities, is found to be incapable of providing or withholding consent to an individually based limitation, the residential care facility may obtain a decision regarding consent from the first of the following, in the following order, who can be located upon reasonable effort by the residential care facility and who is willing to serve as the resident's legal representative for the sole purpose of determining consent to an individually based limitation:

(a) A guardian or other legally appointed representative of the resident who is authorized to make health care decisions;

(b) The resident's spouse;

(c) An adult designated by the others listed in this subsection, if no person listed in this subsection objects to the designation;

(d) A majority of the adult children of the resident who can be located;

(e) Either parent of the resident;

(f) A majority of the adult siblings of the resident who can be located; or

(g) Any adult relative or adult friend of the resident.

(2) A legal representative identified under subsection (1) of this section to consent or withhold consent to an individually based limitation shall make a determination that reflects the legal representative's good faith understanding of the resident's best interest and of what the resident would have wanted if the resident were capable of making the determination.

(3)(a) If none of the persons identified under subsection (1) of this section are available

NOTE: Matter in **boldfaced** type in an amended section is new; matter *[italic and bracketed]* is existing law to be omitted. New sections are in **boldfaced** type.

1 or can be reasonably located, the residential care facility shall form a committee as described
2 in this subsection to make a determination regarding consent to an individually based limi-
3 tation on behalf of the resident.

4 (b) A determination by the committee under this subsection requires assent by a major-
5 ity of the members of the committee.

6 (c) The committee must include at least three members.

7 (d) The committee must include at least one of the following:

8 (A) A representative of the office of the Long Term Care Ombudsman; or

9 (B) The resident's Medicaid case manager or the case manager's designee.

10 (e) The committee may include the following individuals:

11 (A) A representative of the residential care facility;

12 (B) The resident's attending physician, nurse practitioner or other independent health
13 care provider; and

14 (C) A licensed health care provider with knowledge of the resident's wishes and best in-
15 terests.

16 (4) If a committee formed under subsection (3) of this section makes a determination by
17 majority assent, and the decision is not unanimous, a member of the committee who disa-
18 grees with the determination may seek review of the decision from an objective third party
19 individual with experience and expertise relevant to the resident's health condition, status
20 and circumstances. If the objective third party is a health care provider, the health care
21 provider must examine the resident. If the objective third party disagrees with the determi-
22 nation of the committee, the objective third party shall present a written report to the
23 committee describing the reasons for the disagreement. Upon receipt of a written report, the
24 committee shall convene in a timely manner to reconsider its original determination. The
25 committee is not required to reverse its original determination. The residential care facility
26 may implement the original determination of the committee pending review by an objective
27 third party and reconsideration of the decision.

28 (5)(a) If the residential care facility is unable to obtain a determination regarding consent
29 to an individually based limitation from the legal representative under subsection (2) of this
30 section or the committee under subsection (3) of this section in a sufficiently timely manner
31 to protect the safety of the resident or other persons, the residential care facility may im-
32 pose an individually based limitation immediately. The residential care facility shall docu-
33 ment and make available upon request the basis for this finding. An emergency individually
34 based limitation imposed under this subsection must be limited to as short a period as pos-
35 sible to maintain the safety of the resident or other persons. Except as provided in paragraph
36 (b) of this subsection, an emergency individually based limitation may not be imposed for
37 longer than 10 business days from the date on which the individually based limitation is im-
38 posed.

39 (b) An emergency individually based limitation may be imposed for up to 30 business days
40 with verbal or written permission from the resident's Medicaid case manager or a repre-
41 sentative of the Long Term Care Ombudsman.

42 (6)(a) The residential care facility shall provide timely written notice of a finding that the
43 resident is incapable and of the procedure for appealing the incapacity determination to the
44 resident and the resident's legal representative, if a legal representative is identified under
45 subsection (1) of this section.

1 (b) If the resident or the resident's legal representative disagrees with a finding that the
2 resident is incapable, the resident or the resident's legal representative may appeal the in-
3 capacity determination in a contested case hearing in accordance with ORS chapter 183.

4 (7) If a legal representative or a committee makes a determination under subsection (2)
5 or (3) of this section, or if an individually based limitation is imposed under subsection (4)
6 of this section, the residential care facility shall provide written notification to the office of
7 the Long Term Care Ombudsman and the resident's Medicaid case manager of the determi-
8 nation or imposition of an individually based limitation within seven business days of the
9 determination or imposition.

10 (8)(a) A legal representative is not subject to civil or criminal liability or in violation of
11 any professional oath, affirmation or standard of care for any determination the legal rep-
12 resentative made in good faith under subsection (2) of this section.

13 (b) Members of a committee formed under subsection (3) of this section to make a de-
14 termination regarding consent to an individually based limitation are not subject to civil or
15 criminal liability, disciplinary action for violation of any professional oath, affirmation or
16 standard of care or administrative disciplinary action arising from a determination the
17 committee made in good faith.

18 (c) A residential care facility acting in accordance with this section is not subject to civil
19 or criminal liability or administrative disciplinary action arising from reliance in good faith
20 on the consent determination made under subsection (1) or (3) of this section or imposition
21 of an emergency individually based limitation under subsection (5) of this section.

22 (d) A health care provider who makes a determination regarding incapacity under this
23 section is not subject to civil or criminal liability, or in violation of any professional oath,
24 affirmation or standard of care for any determination the health care provider made in good
25 faith.

26 (9) A finding of incapacity under this section does not create a presumption of incapacity
27 or incompetence for any other purpose.

28 (10) Notwithstanding subsections (1) and (3) of this section, a residential care facility may
29 not obtain a decision regarding consent under this section to limit a resident's right to:

30 (a) The usual and typical provision of nutrition and hydration that is necessary to ensure
31 that a resident does not suffer a substantial and irreversible physical impairment of a major
32 bodily function; or

33 (b) Assistance with eating, including but not limited to the provision of nutrition and
34 hydration by cup, hand, bottle, drinking straw or eating utensil, that is necessary to ensure
35 that a resident does not suffer a substantial and irreversible physical impairment of a major
36 bodily function.

37 (11) As used in this section:

38 (a) "Health care provider" means a person licensed, certified or otherwise authorized or
39 permitted by the law of this state to administer health care in the ordinary course of busi-
40 ness or practice of a profession, and includes a clinical social worker licensed under ORS
41 675.530.

42 (b) "Incapable" means that in the independent, professional opinion of the resident's at-
43 tending physician, or of a licensed nurse practitioner, licensed physician assistant or regis-
44 tered nurse who is not an administrator of the residential care facility and who has provided
45 care to the resident in the previous six months, the resident lacks the ability to make and

1 communicate health care decisions to residential care providers and health care providers,
2 including communication through persons familiar with the resident's manner of communi-
3 cating if those persons are available.

4 (c) "Individually based limitation" means a limitation to the resident's right to:

5 (A) Privacy in the resident's sleeping or living unit, including:

6 (i) A unit with an entrance door that the resident can lock and to which only appropriate
7 staff have keys;

8 (ii) A choice of roommates if the resident shares a unit with another resident; and

9 (iii) The freedom to furnish and decorate the unit in accordance with the lease or other
10 agreement;

11 (B) Freedom and support to control the resident's schedule and activities;

12 (C) Access to food at any time;

13 (D) Have visitors of the resident's choosing at any time; and

14 (E) Freedom from restraint.

15 (d) "Safety" means freedom from a significant risk of harm.

16 **SECTION 3.** Section 4 of this 2017 Act is added to and made a part of ORS 443.705 to
17 443.825.

18 **SECTION 4.** (1) If a resident of an adult foster home licensed to serve seniors and people
19 with physical disabilities is found to be incapable of providing or withholding consent to an
20 individually based limitation, the adult foster home may obtain a decision regarding consent
21 from the first of the following, in the following order, who can be located upon reasonable
22 effort by the adult foster home and who is willing to serve as the resident's legal represen-
23 tative for the sole purpose of determining consent to an individually based limitation:

24 (a) A guardian or other legally appointed representative of the resident who is authorized
25 to make health care decisions;

26 (b) The resident's spouse;

27 (c) An adult designated by the others listed in this subsection, if no person listed in this
28 subsection objects to the designation;

29 (d) A majority of the adult children of the resident who can be located;

30 (e) Either parent of the resident;

31 (f) A majority of the adult siblings of the resident who can be located; or

32 (g) Any adult relative or adult friend of the resident.

33 (2) A legal representative identified under subsection (1) of this section to consent or
34 withhold consent to an individually based limitation shall make a determination that reflects
35 the legal representative's good faith understanding of the resident's best interest and of what
36 the resident would have wanted if the resident were capable of making the determination.

37 (3)(a) If none of the persons identified under subsection (1) of this section are available
38 or can be reasonably located, the adult foster home shall form a committee as described in
39 this subsection to make a determination regarding consent to an individually based limitation
40 on behalf of the resident.

41 (b) A determination by the committee under this subsection requires assent by a major-
42 ity of the members of the committee.

43 (c) The committee must include at least three members.

44 (d) The committee must include at least one of the following:

45 (A) A representative of the office of the Long Term Care Ombudsman; or

1 **(B) The resident’s Medicaid case manager or the case manager’s designee.**

2 **(e) The committee may include the following individuals:**

3 **(A) A representative of the adult foster home;**

4 **(B) The resident’s attending physician, nurse practitioner or other independent health**
5 **care provider; and**

6 **(C) A licensed health care provider with knowledge of the resident’s wishes and best in-**
7 **terests.**

8 **(4) If a committee formed under subsection (3) of this section makes a determination by**
9 **majority assent, and the decision is not unanimous, a member of the committee who disa-**
10 **grees with the determination may seek review of the decision from an objective third party**
11 **individual with experience and expertise relevant to the resident’s health condition, status**
12 **and circumstances. If the objective third party is a health care provider, the health care**
13 **provider must examine the resident. If the objective third party disagrees with the determi-**
14 **nation of the committee, the objective third party shall present a written report to the**
15 **committee describing the reasons for the disagreement. Upon receipt of a written report, the**
16 **committee shall convene in a timely manner to reconsider its original determination. The**
17 **committee is not required to reverse its original determination. The adult foster home may**
18 **implement the original determination of the committee pending review by an objective third**
19 **party and reconsideration of the decision.**

20 **(5)(a) If the adult foster home is unable to obtain a determination regarding consent to**
21 **an individually based limitation from the legal representative under subsection (2) of this**
22 **section or the committee under subsection (3) of this section in a sufficiently timely manner**
23 **to protect the safety of the resident or other persons, the adult foster home may impose an**
24 **individually based limitation immediately. The adult foster home shall document and make**
25 **available upon request the basis for this finding. An emergency individually based limitation**
26 **imposed under this subsection must be limited to as short a period as possible to maintain**
27 **the safety of the resident or other persons. Except as provided in paragraph (b) of this sub-**
28 **section, an emergency individually based limitation may not be imposed for longer than 10**
29 **business days from the date on which the individually based limitation is imposed.**

30 **(b) An emergency individually based limitation may be imposed for up to 30 business days**
31 **with verbal or written permission from the resident’s Medicaid case manager or a repre-**
32 **sentative of the Long Term Care Ombudsman.**

33 **(6)(a) The adult foster home shall provide timely written notice of a finding that the**
34 **resident is incapable and of the procedure for appealing the incapacity determination to the**
35 **resident and the resident’s legal representative, if a legal representative is identified under**
36 **subsection (1) of this section.**

37 **(b) If the resident or the resident’s legal representative disagrees with a finding that the**
38 **resident is incapable, the resident or the resident’s legal representative may appeal the in-**
39 **capacity determination in a contested case hearing in accordance with ORS chapter 183.**

40 **(7) If a legal representative or a committee makes a determination under subsection (2)**
41 **or (3) of this section, or if an individually based limitation is imposed under subsection (4)**
42 **of this section, the adult foster home shall provide written notification to the office of the**
43 **Long Term Care Ombudsman and the resident’s Medicaid case manager of the determination**
44 **or imposition of an individually based limitation within seven business days of the determi-**
45 **nation or imposition.**

1 **(8)(a) A legal representative is not subject to civil or criminal liability or in violation of**
2 **any professional oath, affirmation or standard of care for any determination the legal rep-**
3 **resentative made in good faith under subsection (2) of this section.**

4 **(b) Members of a committee formed under subsection (3) of this section to make a de-**
5 **termination regarding consent to an individually based limitation are not subject to civil or**
6 **criminal liability, disciplinary action for violation of any professional oath, affirmation or**
7 **standard of care or administrative disciplinary action arising from a determination the**
8 **committee made in good faith.**

9 **(c) An adult foster home acting in accordance with this section is not subject to civil or**
10 **criminal liability or administrative disciplinary action arising from reliance in good faith on**
11 **the consent determination made under subsection (1) or (3) of this section or imposition of**
12 **an emergency individually based limitation under subsection (5) of this section.**

13 **(d) A health care provider who makes a determination regarding incapacity under this**
14 **section is not subject to civil or criminal liability, or in violation of any professional oath,**
15 **affirmation or standard of care for any determination the health care provider made in good**
16 **faith.**

17 **(9) A finding of incapacity under this section does not create a presumption of incapacity**
18 **or incompetence for any other purpose.**

19 **(10) Notwithstanding subsections (1) and (3) of this section, an adult foster home may**
20 **not obtain a decision regarding consent under this section to limit a resident's right to:**

21 **(a) The usual and typical provision of nutrition and hydration that is necessary to ensure**
22 **that a resident does not suffer a substantial and irreversible physical impairment of a major**
23 **bodily function; or**

24 **(b) Assistance with eating, including but not limited to the provision of nutrition and**
25 **hydration by cup, hand, bottle, drinking straw or eating utensil, that is necessary to ensure**
26 **that a resident does not suffer a substantial and irreversible physical impairment of a major**
27 **bodily function.**

28 **(11) As used in this section:**

29 **(a) "Health care provider" means a person licensed, certified or otherwise authorized or**
30 **permitted by the law of this state to administer health care in the ordinary course of busi-**
31 **ness or practice of a profession, and includes a clinical social worker licensed under ORS**
32 **675.530.**

33 **(b) "Incapable" means that in the independent, professional opinion of the resident's at-**
34 **tending physician, or of a licensed nurse practitioner, licensed physician assistant or regis-**
35 **tered nurse who is not an administrator of the adult foster home and who has provided care**
36 **to the resident in the previous six months, the resident lacks the ability to make and com-**
37 **municate health care decisions to residential care providers and health care providers, in-**
38 **cluding communication through persons familiar with the resident's manner of**
39 **communicating if those persons are available.**

40 **(c) "Individually based limitation" means a limitation to the resident's right to:**

41 **(A) Privacy in the resident's sleeping or living unit, including:**

42 **(i) A unit with an entrance door that the resident can lock and to which only appropriate**
43 **staff have keys;**

44 **(ii) A choice of roommates if the resident shares a unit with another resident; and**

45 **(iii) The freedom to furnish and decorate the unit in accordance with the lease or other**

1 **agreement;**

2 **(B) Freedom and support to control the resident's schedule and activities;**

3 **(C) Access to food at any time;**

4 **(D) Have visitors of the resident's choosing at any time; and**

5 **(E) Freedom from restraint.**

6 **(d) "Safety" means freedom from a significant risk of harm.**

7 **SECTION 5. This 2017 Act takes effect on the 91st day after the date on which the 2017**
8 **regular session of the Seventy-ninth Legislative Assembly adjourns sine die.**

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