

# SENATE . . . . . No. 396

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## The Commonwealth of Massachusetts

PRESENTED BY:

***Jacob R. Oliveira***

*To the Honorable Senate and House of Representatives of the Commonwealth of Massachusetts in General Court assembled:*

The undersigned legislators and/or citizens respectfully petition for the adoption of the accompanying bill:

An Act to establish the office of elder advocate.

PETITION OF:

| NAME:                      | DISTRICT/ADDRESS:                       |                  |
|----------------------------|-----------------------------------------|------------------|
| <i>Jacob R. Oliveira</i>   | <i>Hampden, Hampshire and Worcester</i> |                  |
| <i>Josh S. Cutler</i>      | <i>6th Plymouth</i>                     |                  |
| <i>Brian M. Ashe</i>       | <i>2nd Hampden</i>                      | <i>2/2/2023</i>  |
| <i>Patrick M. O'Connor</i> | <i>First Plymouth and Norfolk</i>       | <i>2/13/2023</i> |
| <i>Michael O. Moore</i>    | <i>Second Worcester</i>                 | <i>2/16/2023</i> |
| <i>Patricia D. Jehlen</i>  | <i>Second Middlesex</i>                 | <i>3/3/2023</i>  |
| <i>James B. Eldridge</i>   | <i>Middlesex and Worcester</i>          | <i>3/6/2023</i>  |

# SENATE . . . . . No. 396

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By Mr. Oliveira, a petition (accompanied by bill, Senate, No. 396) of Jacob R. Oliveira, Josh S. Cutler, Brian M. Ashe, Patrick M. O'Connor and other members of the General Court for legislation to establish the office of elder advocate. Elder Affairs.

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## The Commonwealth of Massachusetts

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In the One Hundred and Ninety-Third General Court  
(2023-2024)  
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An Act to establish the office of elder advocate.

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

1           SECTION 1. Definitions.

2           As used in this chapter, the following words shall have the following meanings unless the  
3 context clearly requires otherwise:

4           "Advisory council", the elder advocate advisory council established in section 4.

5           'Elder advocate', the elder advocate appointed under section 3.

6           "Critical incident", (i) a fatality, near fatality or serious bodily or emotional injury of an  
7 older adult or person with disabilities who is in the custody of or receiving services from an  
8 executive agency or a constituent agency, or private party whose clients or residents in whole or  
9 in part of funded with public funds or (ii) circumstances which result in a reasonable belief that  
10 an executive agency or a constituent agency failed in its duty to protect an older adult or person

with disabilities and, as a result, the older adult or person with disabilities was at imminent risk of, or suffered serious bodily or emotional injury or death.

"Department", the department of public health.

"Executive agency", a state agency within the office of the governor, including the executive office of elder affairs, the executive office of public safety and security, executive office of health and human services, the executive office of housing, the executive office of transportation and their constituent agencies, the Massachusetts interagency council on housing and homelessness.

"Office", the office of the elder advocate.

"Serious bodily or emotional injury", an injury which involves a substantial risk of death, extreme physical pain, protracted and obvious disfigurement or protracted loss or impairment of the function of a bodily member, organ or mental faculty or emotional distress.

## SECTION 2. Office of the Elder Advocate; Duties

There shall be an office of the elder advocate which shall be independent of any supervision or control by any executive agency. The office shall:

(a) ensure that older adults and people with disabilities involved with an executive agency, in particular, adult served by the executive office of health and human services, or executive office of elder affairs, and agencies reporting to said executive offices or private entities that receive public funding, including Medicare and Medicaid reimbursements, receive timely, safe and effective services;

31 (b) ensure that older adults or people with disabilities placed in the care of the  
32 commonwealth or receiving services under the supervision or regulation of an executive agency  
33 in any public or private facility shall receive humane and dignified treatment at all times, with  
34 full respect for the person's personal dignity, right to privacy, and right to a free and appropriate  
35 education in accordance with state and federal law;

36 (c) examine, on a system-wide basis, the care and services that executive agencies  
37 provide older adults or people with disabilities;

38 (d) advise the public and those at the highest levels of state government about how the  
39 commonwealth may improve its services to and for older adults, people with disabilities,  
40 caregivers, and their families; and

41 (e) impose temporary cost share agreements, as necessary pursuant to section 16R of  
42 chapter 6A to ensure children's timely access to services.

43 The office shall act to investigate and ensure that the highest quality of services and  
44 supports are provided to safeguard the health, safety and well-being of all older adults and people  
45 with disabilities receiving services. The office shall examine systemic issues related to the  
46 provision of services to older adults or people with disabilities and provide recommendations to  
47 improve the quality of those services in order to give each person the opportunity to live a full  
48 and productive life.

### 49 SECTION 3. Elder Advocate: Appointment; vacancies, removal

50 The office of the elder advocate shall be under the direction of the elder advocate. The  
51 elder advocate shall be the administrative head of the office and shall devote full-time to the

52 duties of the office. The elder advocate shall be appointed by a majority vote of the attorney  
53 general, the state auditor and the governor from a list of 3 nominees submitted by a nominating  
54 committee to recommend an elder advocate. The nominating committee shall consist of: the  
55 secretary of health and human services; the commissioner of children and families; the  
56 commissioner of ; the commissioner of mental health; the executive director of the elder abuse  
57 prevention board; a geriatrician experienced in treating victims of elder abuse who shall be  
58 designated by the Massachusetts chapter of the American Academy of Geriatrics; an adult  
59 psychiatrist who shall be designated by the Massachusetts Psychiatric Society, Inc.; a adult  
60 psychologist who shall be designated by The Massachusetts Psychological Association, Inc.; a  
61 representative from the Massachusetts Association for Mental Health, Inc.; a representative of an  
62 organization that advocates on behalf of older adults and people with disabilities recommended  
63 by Dignity Alliance Massachusetts Inc.; an attorney experienced in care and protection cases  
64 who shall be designated by the Massachusetts Bar Association; a social worker who shall be  
65 designated by the Massachusetts chapter of the National Association of Social Workers, Inc.; a  
66 person with experience in elder law system who shall be designated by the chief justice of the  
67 superior court department and a representative of organized labor who shall be designated by the  
68 president of a collective bargaining unit that represents nursing home or home care workers. The  
69 work of the nominating committee shall be coordinated by the executive office of health and  
70 human services.

71 Any person appointed to the position of elder advocate shall be selected without regard to  
72 political affiliation and on the basis of integrity and demonstrated ability in aging services, elder  
73 law, disability law, auditing, law, management analysis, public administration and investigation

or criminal justice administration. The elder advocate may, subject to appropriation, appoint such other personnel as the elder advocate deems necessary for the efficient management of the office.

The elder advocate shall serve for a term of 5 years. In case of a vacancy in the position of the elder advocate, a successor shall be appointed in the same manner for the remainder of the unexpired term. No person shall be appointed as elder advocate for more than 2 full terms.

The elder advocate may be removed from office for cause by a majority vote of the attorney general, the state auditor and the governor. Such cause may include substantial neglect of duty, gross misconduct or conviction of a crime. The cause for removal of the elder advocate shall be stated in writing and shall be sent to the clerks of the senate and house of representatives and to the governor at the time of removal and shall be a public document.

#### SECTION 4 Elder Advocate Advisory Council; duties and salary

There shall be a 25-member elder advocate advisory council. The advisory council shall consist of the elder advocate, who shall serve as chair, the secretary of health and human services, the secretary of elder affairs, the secretary of public safety and security, the secretary of housing, the commissioner of mental health, the commissioner of developmental services, the commissioner of public health, the commissioner of the Massachusetts rehabilitation commission, the commissioner for the deaf and hard of hearing, the commissioner for the blind, the commissioner of transitional assistance,, the chief justice of the probate and family court department, the executive director of the elder abuse prevention board, and 3 persons appointed by the governor.

The elder advocate shall meet with the advisory council at least annually and shall present to the advisory council the annual goals of the office and its plans for monitoring the

work, including the continuing quality improvement, of the elder and disability service agencies and the identification of any critical gaps and issues relating to interagency collaboration. The elder advocate may consult with or request the assistance of members of the advisory council with respect to the duties and responsibilities of the office; provided however, that any request for assistance shall not place requirements on any member of the council to fulfill the request.

The advisory council shall annually set the salary of the elder advocate; provided, however, that such salary shall not exceed 90 per cent of the salary of the chief justice of the supreme judicial court.

#### SECTION 5. Investigation of critical incidents; coordination with other agencies, complaints

(a) An executive agency shall inform the elder advocate as soon as practicable when a critical incident has occurred. The elder advocate may conduct an investigation of the critical incident or may review an executive agency's investigation of a critical incident. When the elder advocate conducts his own investigation, he shall determine: (1) the factual circumstances surrounding the critical incident; (2) whether an agency's activities or services provided to an older adult or person with disabilities and his family were adequate and appropriate and in accordance with agency policies and state and federal law; and (3) whether the agency's policies, regulations, training or delivery of services or state law can be improved.

(b) Before investigating any critical incident, the elder advocate shall determine whether an executive or law enforcement agency is already conducting an investigation. If a law enforcement agency is conducting an investigation, the elder advocate shall, when appropriate, defer to that agency or may conduct his own investigation. The elder advocate shall coordinate

efforts to minimize the impact on the older adult or person with disabilities, family or employees of the agency involved, unless he determines such coordination would impede his investigation. If an executive agency is conducting an investigation, the elder advocate may defer to that investigation or may conduct his own investigation. The elder advocate may coordinate efforts to minimize the impact on the older adult or person with disabilities, family or employees of the agency involved. In every instance, the elder advocate shall notify the head of the relevant agency of his involvement before beginning any investigation.

(c) The elder advocate shall receive complaints relative to the provision of services to older adults or people with disabilities by an executive agency and shall review and monitor the complaints that reasonably cause him to believe that an older adult or person with disabilities may be in need of assistance and to ensure that the complaint is resolved. If the complaint is not resolved by the relevant executive agency within a reasonable period of time in light of the circumstances, if the resolution is determined to be unsatisfactory to the elder advocate, or if the complaint reasonably causes the elder advocate to believe that an older adult or person with disabilities may be in need of immediate assistance, the elder advocate may conduct an investigation and upon completion of the investigation, the elder advocate may provide relevant information in the form of a report to any relevant agencies and request a meeting, if necessary, to review the investigation and accompanying report.

(d) The elder advocate shall receive complaints from adults in the care or with support of the commonwealth and assist such adults in resolving problems and concerns associated with their placement, plans for life-long adult connections and independent living, and decisions regarding custody of persons aged 22 and above, including ensuring that relevant executive agencies have been alerted to the complaint and facilitating intra-agency cooperation, if

appropriate. For the purposes of this section, the office shall develop procedures to ensure appropriate responses to the concerns of adults in foster care or guardianship.

(e) The elder advocate shall periodically review, report and make recommendations, as appropriate, with respect to system-wide improvements that may increase the effectiveness of the care and services provided to older adults, people with disabilities, and their families and suggested legislative and regulatory changes including, but not limited to, a review of the programs and procedures established by the department to provide and administer a comprehensive program of services and supports.

(f) The elder advocate shall perform oversight functions to ensure that agencies serving older adults and people with disabilities are fulfilling their obligations in the most effective and efficient manner.

(g) The elder advocate shall undertake activities designed to educate the public regarding the services of the office and of the mission of the executive agencies in providing services to older adults, people with disabilities and their families.

(h) The elder advocate shall be authorized to apply for, and accept on behalf of the commonwealth, federal, local or private grants, bequests, gifts or contributions for the purpose of carrying out the functions of the office.

#### SECTION 6. Access to Facilities and records, release of information

The elder advocate or his designee shall have access at any and all reasonable times to any facility, residence, program, or portion thereof, that is operated, licensed or funded by an executive agency, and shall have unrestricted access to all electronic information systems

records, reports, materials and employees in order to better understand the needs of older adults and people with disabilities in the custody of the commonwealth or who are receiving services from an executive agency. The elder advocate shall have access to relevant records held by the clerk of the trial court and the clerk of the probate and family court, including the right to inspect and copy, without cost. The elder advocate shall be bound by any limitations on the use or release of information imposed by law upon the party furnishing such information, except as provided in subsection (e) of section 12.

#### SECTION 7. Witnesses, documents, subpoenas

The elder advocate may request the attendance and testimony of witnesses and the production of documents, papers, books, records, reports, reviews, recommendations, correspondence, data and other evidence that the elder advocate reasonably believes is relevant. If a request is denied, the elder advocate shall have the power to issue a subpoena for witnesses and the production of documents and any other data and evidence that the elder advocate reasonably believes is relevant.

If any person to whom a subpoena is issued fails to appear or, having appeared, refuses to give testimony or fails to produce the evidence required, the elder advocate may apply to the Suffolk county superior court to issue an order to compel the testimony and production of documents of any such witnesses. A failure to obey the order may be punished as contempt.

The district attorney may seek injunctive relief in Suffolk county superior court to defer a subpoena issued by the elder advocate.

#### SECTION 8. Discrimination or retaliation, penalties

No discriminatory or retaliatory action shall be taken against any person who communicates with or provides information to the office. Any person who knowingly or willfully discriminates or retaliates against such a person shall be liable to such person for treble damages, costs and attorney's fees.

#### SECTION 9. Procedures for performance of duties, rules and regulations

The elder advocate shall develop internal procedures appropriate for the effective performance of his duties.

The elder advocate may, subject to chapter 30A, adopt, amend or repeal such rules and regulations as are deemed necessary to carry out the functions of the office.

#### SECTION 10. Annual Report

The elder advocate shall report annually to the governor, the president of the senate, the speaker of the house, the senate and the house committees on ways and means, and the chairs of the joint committee on elder affairs, the chairs of the joint committee on children, families and persons with disabilities on the activities of the office, including an analysis of the delivery of service to children, activities undertaken to implement subsection (d) of section 5, recommendations for changes in agency procedures which would enable the commonwealth to better provide services to and for older adults, people with disabilities, and their families and priorities for implementation of those changes to services. The report shall be made public.

#### SECTION 11. Examination of systemwide responses to elder abuse and neglect

Section 11. The elder advocate, in consultation with the advisory council, may from time to time, examine systemwide responses to elder abuse and neglect, including related mental

health, substance use and domestic violence issues, and shall file a report on any such examination with the governor, the clerks of the senate and house of representatives, the senate and house committees on ways and means, the joint committee on elder affairs, and the joint committee on children, families and persons with disabilities. The elder advocate's examination may include, without limitation, racial disproportionality and disparity, elopements, mandated reporting, screening of elder or handicapped abuse and neglect reports, social worker qualifications and caseloads, law enforcement involvement, health service needs, including behavioral health needs, of older adults and people with disabilities at risk, criminal offender record information reviews, administrative and cost requirements, federal funding for aging and disability purposes and the effectiveness of elder or disability abuse or bullying laws. The elder advocate may seek advice broadly from individuals with expertise in aging or disability welfare in preparing a report under this section.

Section 12. Information and records; confidentiality; subpoena and discovery; public disclosure; investigation of critical incidents

Section 12. The following provisions apply to information and records obtained, reviewed or maintained by the elder advocate:

(a) Notwithstanding the provisions of any general or special law to the contrary, the disclosure of information to the office of the elder advocate pursuant to this chapter shall not be prohibited. Any information considered to be confidential shall be submitted for the elder advocate's review upon the determination of the elder advocate that the review of said information is necessary. The elder advocate shall ensure that no information submitted for his review is disseminated to parties outside the office, except when disclosure may be necessary to

enable the elder advocate to perform the elder advocate's duties. Under no circumstances shall the elder advocate or any employee of the office violate the confidentiality provisions set forth in the aforementioned statutes, except as authorized under subsection (e).

(b) Any and all information and records acquired by the elder advocate in the exercise of the office's purpose and duties under this chapter shall be confidential and exempt from disclosure under chapter 66 and clause Twenty-sixth of section 7 of chapter 4.

(c) Information, documents and records of the elder advocate and his office shall not be subject to subpoena, discovery or introduction into evidence in any civil or criminal proceeding; provided, however, that information, documents and records otherwise available from any other source shall not be immune from subpoena, discovery or introduction into evidence through these sources solely because they were presented during the elder advocate's investigation or maintained by the office of the elder advocate.

(d) Statistical compilations of data which do not contain any information that would permit the identification of any person may be disclosed to the public.

(e) The restrictions of this section shall not preclude the elder advocate from sharing with the governor, the attorney general, a district attorney, a secretary, an agency commissioner or other agency personnel, or the chairs of the joint committee on elder affairs or the chairs of the joint committee on children, families and persons with disabilities, the report of, or the results of, a critical incident investigation involving that agency. Any executive or legislative branch employees who receive or read such a document shall be bound by the confidentiality requirements of this section.

Section 13. Personal liability for civil damages

248           Section 13. No person employed by or contracted by or volunteering for the office shall  
249   be subject to suit directly, derivatively or by way of contribution or indemnification for any civil  
250   damages under the laws of the commonwealth resulting from any act or omission performed  
251   during or in connection with the discharge of his duties within the scope of his employment or  
252   appointment, unless such act or failure to act was committed with gross negligence, maliciously,  
253   or in bad faith.