



The National  
**CONSUMER VOICE**  
for Quality Long-Term Care

November 13, 2023

**Adult Protective Services – Proposed Rule, RIN Number 0985-AA18**

Submitted at • <http://www.regulations.gov>.

Administration on Aging, Administration for Community Living, Department of Health and Human Services  
330 C Street SW, Washington, DC 20201  
Attention: Stephanie Whittier Eliason

Dear Ms. Whittier Eliason:

National Consumer Voice for Quality Long-Term Care (Consumer Voice) submits comments regarding the Notice of Proposed Rulemaking (NPRM) published on September 12, 2023, to modify regulations of the Older Americans Act to include subpart D related to Adult Protective Services (APS). Consumer Voice is the leading national voice representing consumers in issues related to long-term care, helping to ensure that consumers are empowered to advocate for themselves. We are a primary source of information and tools for consumers, families, caregivers, advocates, and ombudsmen to help ensure quality care for individuals.

We commend the Administration for Community Living (ACL) for providing APS leadership. The APS Voluntary Consensus Guidelines have set an excellent minimum baseline for future regulations, guidance, and best practices for states' APS programs. We are glad that many of the guidelines are now being implemented regulatorily.

Consumer Voice offers these general comments for consideration.

- Given that these are the first proposed federal regulations for APS, it is critical that there is consistency of practice across the nation. Setting minimum requirements such as training curriculum and mandated hours of training for

- APS staff and APS supervisors will enhance understanding of APS by staff, consumers, and reporters of adult maltreatment.
- Providing guidelines and best practices for APS administration and delivery will enhance consistency nationwide.
  - We suggest that in sections where agreements between entities are proposed, tribal nations are also listed as potential partners.

Consumer Voice supports establishing policies and procedures for the administration and operations of APS programs and recommends ACL share guidance and best practice examples to assist APS administrators in developing proposed policies and procedures. Consumer Voice also encourages and supports appropriations to fund federal and state entities responsible for administering adult protective services programs to ensure the protection of all adults.

Additionally, Consumer Voice urges ACL to explore the role of state APS programs in the guardianship process. It is not uncommon for APS programs to petition courts to find that an adult is incapacitated and to appoint a guardian. Unfortunately, this practice can result in some adults losing fundamental human rights. This practice raises significant ethical conflicts since it places APS in the position of investigating and protecting potential victims of maltreatment or neglect while at the same time reserving the power to petition a local court and having the potential victim's civil rights removed.

This practice varies from state to state yet presents the same ethical conflicts. Some adults who know that calling APS may result in losing their rights may be reticent to contact APS or cooperate with their investigation. Further, there are no disclosure requirements by APS workers that they may, based on their assessment, petition a court to have a potential victim's rights removed. We urge ACL to investigate the policies or procedures of each state APS system regarding the guardianship process and establish regulations that ensure the rights of older adults are protected.

Consumer Voice offers the following specific comments.

**The definition of "trust relationship" should be expanded to consider the potential victim's perspective.**

As worded, the definition of "trust relationship" uses an objective third-party standard to establish whether a trust relationship exists. It is unclear whether the regulations consider the subjective belief of the client or victim, and if it does, how much weight

these beliefs are given. The proposed language states “the rational expectation or belief...This expectation is based on either the willful assumption of responsibility or expectation of care or protection arising from legal or social conventions.”<sup>1</sup> While the regulation states how to determine whether a “rational expectation” exists, it is not clear whether these same criteria are used to determine a rational belief. Does the NPRM intend to treat expectation and belief interchangeably?

We are concerned that evaluating an adult’s “rational belief” based on a “willful assumption of responsibility” or an “expectation of care or protection arising from legal or social norms”, puts the focus not on the individual, but on 1) whether the person who is potentially in a trust relationship assumed that responsibility, or 2) whether legal or social conventions find that it is reasonable for this relationship to exist. What social conventions does the NPRM propose to be used? Social conventions can differ from household to household. Which conventions does the NPRM choose to adopt? Which conventions take priority over other conventions?

To avoid judging an adult’s belief against the myriad legal and social conventions that may exist, we encourage ACL to define “belief” separately from expectation and center it on the particular facts of the case, and not rely solely on legal and social conventions. For instance, the NPRM could require APS programs to consider the totality of the circumstances, including the adult’s reasonable belief at the time of the investigation.

We also worry about unintended consequences, as some social conventions may mandate that a daughter take care of a mother, including protecting “the interests of an adult and/or provide for an adult’s care.”<sup>2</sup> Does that mean an estranged daughter is in a “trust relationship”, if social, or in some states, legal, conventions require it? What about a parent or spouse who refuses help from a child or a spouse? Do social or legal conventions still impart to that child or spouse the duties implied by the regulations?

For these reasons, the reasonable “belief” as to whether a “trust relationship” must be, when possible, centered on the adult’s belief in each circumstance. Of course, there will be times when it may be impossible to communicate with an adult to determine facts or expectations. In those instances, the third-party tests mentioned in the regs may be more helpful. However, APS programs should focus equally on the belief of an adult, while relying on legal and social conventions when that belief is unknowable or unreasonable.

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<sup>1</sup> NPRM, p. 62520.

<sup>2</sup> Id.

Additionally, we recommend making clear that a “Trust Relationship” exists between a consumer of long-term care services and the provider contracted to provide those services.

Lastly, the requirement that a “trust relationship” exists between the victim and perpetrator significantly narrows the applicability of the APS regulations. Currently, many state APS programs receive and investigate reports of adult maltreatment allegedly caused by people not in a trust relationship, as defined in the proposed regulation, with the victim. To avoid reducing these current protections for adults, or limiting future protections, we recommend that states be given the authority to expand the types of complaints they investigate beyond the limits imposed by the “trusted limit” definition.

**Consumer Voice urges ACL to include the investigation of maltreatment and provision of services to residents of skilled nursing facilities and residential care communities within the APS scope of work.**

Residents of long-term care facilities subject to maltreatment or neglect deserve the same protections and resources as non-institutionalized adults. Currently, in some states, victims of abuse in long-term care facilities must rely either on the state survey agency and/or law enforcement. While state survey agencies may be able to cite a facility for maltreatment of residents, they do not provide resident/victim services. Additionally, state survey agencies are perennially underfunded and subject to significant delays in conducting proper investigations or surveys.<sup>3</sup> A report of maltreatment may be made to law enforcement, but often, law enforcement does not make it a priority to investigate reports in nursing facilities or residential care communities.

To ensure adults subject to maltreatment inside long-term care facilities are provided the same protections and services as an individual in the community, APS programs should be required to investigate abuse in long-term care settings.

Consumer Voice notes that conflicts in investigations being conducted by multiple agencies can be addressed by the NPRM’s requirement that APS programs create information and data sharing agreements with other state entities responsible for adult maltreatment investigation and/or services. These agreements should include

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<sup>3</sup> <https://www.finance.senate.gov/imo/media/doc/02222023%20Left%20in%20the%20Dark%20-%20Wyden-Casey%20final.pdf>

the prioritization of “which agency does what when” in long-term care facilities and which agency has the lead responsibility for investigating the maltreatment of adults.

Consumer Voice recommends that APS provide an adult, their legal representative, or a representative designated by the client notice of the adult’s rights.

**Consumer Voice supports APS staff-to-client ratios.**

Proposed § 1324.402(d) requires the State entity to establish policies and procedures for the staffing of APS systems. We propose to require States to establish a minimum staff-to-client ratio appropriate to the circumstances in the State. We believe, consistent with the literature, that fixed staff-to-client ratios in APS systems will improve health and safety outcomes for adult victims of maltreatment. We also believe that establishing fixed staff-to-client ratios will improve the long-term continuity of APS programs. We request comment on whether staff-to-client ratios are feasible for APS programs and whether required workload studies would assist in the development of appropriate ratios.

Consumer Voice agrees with the need to establish workload studies and that funding is needed for states to develop and determine appropriate ratios. In addition to the minimum staff-to-client ratio, the complexity of casework for different types of maltreatment investigations should be factored into the ratio.

**Consumer Voice supports the proposal mandating APS training.**

Consumer Voice supports requiring mandated APS training. The NPRM should go further by defining minimum training requirements and minimum training hours for “APS core competencies”, initial APS staff training, continuing education for all APS staff, and training of supervisors.

**Consumer Voices supports the requirement that state APS programs establish policies and procedures to prevent, recognize, and promptly address both real and perceived conflicts of interest at the organizational and individual levels.**

We appreciate the NPRM focusing on the serious issue of conflicts of interest that may arise between APS programs, individual APS workers, and adults. It is critical that investigators of maltreatment of adults be conducted by unbiased and objective investigators. However, we are concerned that, as proposed, conflicts of interest could be defined differently in each state. For instance, there may be institutional conflicts inherent in a current state system due to state program structure. For instance, some state or local Area Agencies on Aging may hold the APS contract along with being a

gatekeeper for Home and Community-Based Services. These are complex problems that could create “dual relationships” as defined on page 62519 of the NPRM. Despite these conflicts, the NPRM permits these types of relationships.<sup>4</sup> Consumer Voice is concerned that this permissive language will result in states not addressing structural conflicts of interest, as “unavoidable”.<sup>5</sup> We urge ACL to take a more active role in determining whether conflicts of interest are “unavoidable”. This process could include a waiver process conducted to determine whether the conflict compromises the integrity of investigations.

In addition, where conflicts do arise, all adults who may be victims of maltreatment must be made aware of these conflicts by written notice. Adults who do not consent to these conflicts should be provided with an alternate investigative method, for instance referral to law enforcement.

As noted, many APS programs have the authority or are even required to petition for court-ordered guardianship, should they believe the adult lacks capacity. In other words, a report of abuse against an adult could ultimately result in that adult losing his or her rights. Consumer Voice is concerned that a victim of maltreatment or neglect may not contact or cooperate with APS if the ultimate result could be the loss of their civil rights.

ACL should explore the role of state APS programs in the guardianship process and determine whether necessary protections and protocols exist related to notice to the client about their rights, including to legal counsel; pursuit of least restrictive alternatives; the appropriateness of APS guardianship filings; and other issues related to ensuring protection of client rights and safety.

**Consumer Voice agrees that online reporting capabilities in addition to traditional options (phone, mail or in-person) for reporting are important.**

We recommend the following clarification: “Proposed 1324.405 requires the State entity to have policies and procedures for accepting reports *including anonymous reports* of adult maltreatment.” To ensure that all states accept anonymous complaints, the NPRM should make it clear.

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<sup>4</sup> NPRM, p. 62520

<sup>5</sup> *Id.*

Thank you for the opportunity to comment. If we can answer any questions or be of assistance please contact us.

Sincerely,

/s

Lori Smetanka, Executive Director  
The National Consumer Voice for Quality Long-Term Care