



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

August 15, 2023

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

RE: Comments on the Notice of Proposed Rulemaking: Older Americans Act of 1965  
(Submitted electronically via <http://regulations.gov>)

The National Consumer Voice for Quality Long-Term Care (Consumer Voice) appreciates the opportunity to submit comments on the Notice of Proposed Rulemaking: Older Americans Act. The Consumer Voice is a national non-profit organization that works with, and represents the interests of, individuals receiving long-term care and services in both congregate and home and community-based settings.

We are strongly supportive of many new sections and additions to these rules. Additionally, we have suggestions for sections ACL should consider expanding or clarifying.

**§ 1321.9(c)(2)(vii) Funding the State Long Term Care Ombudsman Program (p. 39614)**

Consumer Voice supports the clarification regarding program financial information to be provided to, and responsibilities of, the State Long-Term Care Ombudsman, especially subsection (B) that the State agency must provide the Ombudsman with verifiable expenditure information and (C) ensuring fiscal management and determination of resources for the operation of the Office are in compliance with §1324.13(f). As the head of the Office, the Ombudsman is responsible for the fiscal management of the Office, which includes the use of fiscal resources appropriated or available for the program and ensuring program budgets and expenditures are consistent with laws and policies and procedures. Additionally, the Ombudsman (and State agency) are required to submit an annual certification of Ombudsman program expenditures therefore the Ombudsman needs access to complete and verifiable fiscal information to complete the annual certification and other annual reports.

**§ 1321.77 Purpose of Services-person and family-centered, trauma informed (p. 39626)**

We appreciate and support the inclusion of language focused on person-centered care and services throughout the rules and we strongly support the addition of this new section. All

recipients of Long-Term Care Supports and Services (LTSS) are entitled to be treated with respect and dignity and to receive quality person-centered care. In addition, we support requiring services to be trauma-informed. Sensitivity to an LTSS recipient's personal needs and awareness of trauma helps ensure LTSS are provided in a manner particular to each recipient.

### **§1321.93 Legal Assistance (p.39628)**

Consumer Voice supports language in this section providing additional clarity around priority areas and responsibilities of Legal Assistance programs and providers. We would encourage ACL to include prioritizing serving individuals facing the loss of housing, whether that be in a home or community-based setting, or a long-term care facility. These individuals often are most at risk of homelessness and have few, if any, resources to protect themselves or obtain legal support.

Additionally, under **§ 1321.93(d)(2)(i, ii) Defense of Guardianship (p.39628)** there are three conditions that must be met before a Title III-B legal services provider can represent a petitioner in a guardianship case: 1 – the petitioner must be an older individual, 2 – no other alternatives to guardianship are appropriate, 3 – other adequate representation is unavailable.

We appreciate that ACL included the requirement that the legal services program ascertain that no other [less restrictive] alternatives to guardianship are appropriate. Guardianship should always be a last resort because it deprives individuals of fundamental rights, is often overbroad, and can pose the risk of serious harm to the individual.

We believe this part of the rule could be strengthened by requiring programs to "*document* that no less restrictive alternatives to guardianship are appropriate."

We also appreciate that ACL seeks to ensure that programs represent petitioners in guardianship cases in the rarest of cases. To that end, ACL could add a fourth criteria that would require the program to "*document* that the guardianship is necessary to prevent serious harm to the individual who would be the subject of the petition" or similar language.

We additionally appreciate that ACL included in the regulation that defense of guardianship includes "Representation to promote use of least-restrictive alternatives to guardianship to preserve or restore an individual's rights and or autonomy." This type of representation would include services such as assisting a client in making a power of attorney or health care advance directive. Advance planning for future incapacity is a critical way to avoid guardianship.

### **§1324.11 Establishment of the Office of Long-Term Care Ombudsman (p. 39640) Use of "Informed Consent"**

Consumer Voice recommends clarifying the meaning of “informed consent” related to the resident-directed role of the Long-Term Care Ombudsman program. We recommend seeking input from ombudsman programs, residents, families, and other stakeholders when making this clarification.

The goal of the Ombudsman program is to focus on the resident and their wishes even when the resident is not able to make all their own decisions. There are residents who make many daily decisions, but leave complex medical decisions and major financial decisions up to an individual acting as their representative.

Due to the current lack of definition for the term “informed consent” some facilities, guardians, and others have attempted to limit the ability of the Ombudsman program to advocate on behalf of residents. There are multiple definitions (i.e., legal, medical) of “informed consent” leading the term to be used differently in states and facilities and, in some cases, imposing a very high threshold that impacts the effectiveness of Ombudsman program advocacy. Some states have removed the word “informed” from their state statutes because it has impacted the ability of the Ombudsman Program in advocating on behalf of residents with guardians and residents with varying levels of capacity.

While Consumer Voice does not recommend removing the word “informed,” we encourage ACL to provide a better understanding of what is meant by “informed consent.” This is critical to the Ombudsman program for developing program policies and procedures, training representatives, and ensuring resident-directed advocacy.

Any clarification should include the understanding that in seeking consent, residents are given a full explanation of the facts, options, and possible outcomes of such options in the manner and language in which the resident or resident representative understands. We are happy to work with ACL in finding ways to clarify this term.

#### **1324.11(e)(1) State Ombudsman Program Administration (p. 39640)**

We recommend, for the continuity of operations of the State Long-Term Care Ombudsman program and continued access to residents of long-term care facilities by representatives during an emergency situation, that ACL require that the policies and procedures for Ombudsman program administration, and require that the Ombudsman create and maintain an emergency preparedness plan which incorporates continuity of operations planning, all-hazards approach planning, and coordination with emergency response agencies.

Over the past two decades, since Hurricane Katrina, there has been an emphasis on emergency preparedness for the aging and disability community, including steps taken by ACL and CMS to encourage and/or require Long-Term Care Ombudsman programs to incorporate emergency

preparedness language into their operations or policies and procedures. This NPRM is an opportunity to incorporate a requirement into these rules.

**§ 1324.11(e)(3)(v)-(vi) Prohibition on Mandatory Reporting of Abuse (p. 39641)**

Consumer Voice supports the clarifying language in this section that the Ombudsman and representatives of the Office are not mandatory reporters of abuse, neglect, or exploitation, except in limited circumstances, and requiring State agencies to have policies and procedures to that effect. Despite long-standing requirements in the OAA and regulations regarding disclosure of resident-identifying information only with consent of the resident or their representative, this has continued to be an issue in states where the Ombudsman program is not exempt from reporting in state rules, laws, and professional licensing requirements.

**§ 1324.15 (e) State agency monitoring. (p. 39644)**

To ensure Ombudsman programs are performing all functions, responsibilities, and duties established in §§ 1324.13 and 1324.19, State agency monitoring assessments should include a review and documentation of Ombudsman program's systems advocacy activities, such as representing the interests of residents before governmental agencies, or analyzing, commenting on and monitoring the development and implementation of laws, regulations, and policies that pertain to resident safety, health, and well-being, among others. According to these requirements, policies and procedures must "assure that the Office is required to and has sufficient authority" to carry out duties related to systems advocacy. Therefore, the State agency assessment should ask for examples of systems advocacy (both at the state and local level, if applicable) to ensure the Office has the ability to perform these duties.

**§ 1324.303 Legal Assistance Developer (p. 39649)**

We support the clarification of the roles and responsibilities of the legal assistance developer. However, we encourage ACL to strengthen the legal assistance developer role by requiring it to be a full-time position, held by an attorney with experience working with Older Americans Act program beneficiaries.

Individuals assigned this role are frequently set up for failure – many have little or no legal training, authority, or time. The legal assistance developer is critical for leading and coordinating strong and effective legal assistance services in a state. This is not possible if the developer does not have experience with those receiving OAA program services and full-time status.

Thank you for the opportunity to submit comments on this proposed rule as ACL continues to clarify the authority and responsibilities of the Older Americans Act programs. We appreciate your work and leadership on behalf of older adults.

Sincerely,

A handwritten signature in cursive script that reads "Lori Smetanka". The signature is written in a dark ink and is positioned below the word "Sincerely,".

Lori Smetanka  
Executive Director