

JUSTICE IN AGING

FIGHTING SENIOR POVERTY THROUGH LAW

August 15, 2023

Department of Health & Human Services
Administration for Community Living
Administration on Aging, Attention: ACL-AA17-P
330 C Street SW
Washington, DC 20201

Submitted electronically via Regulations.gov

Comments on Notice of Proposed Rulemaking: Older Americans Act Regulations (RIN 0985-AA17)

Justice in Aging appreciates the opportunity to comment on the Update to ACL's Older Americans Act Regulations notice of proposed rulemaking (NPRM) issued by the Administration for Community Living (ACL). We strongly support many of ACL's proposals in this NPRM to meet the changing needs of older adults and strengthen services to promote elder rights and self-determination.

Justice in Aging is an advocacy organization with the mission of improving the lives of low-income older adults. We fight senior poverty through law by securing access to affordable health care, economic security, elder rights, and the courts for older adults with limited resources. We focus our efforts primarily on fighting for people who have been marginalized and excluded from justice, such as women, people of color, LGBTQ+ individuals, and people with limited English proficiency. Since our founding over 50 years ago, we have been a key member of the legal services community and an essential partner within the broader aging community. Through running the federal resource center, National Center on Law and Elder Rights (NCLER), Justice in Aging is connected to a network of over 55,000 lawyers and elder rights and aging services professionals working with older adults. This network frequently informs us of the growing number and complexity of issues facing older adults.

Our comments focus on the provisions of the proposed rule that seek to improve access to legal assistance for older adults and enhance the preservation of elder rights through defense of guardianship. We also focus our comments on the provisions of the rule that can further advance equity, particularly for older adults of color, older women, LGBTQ+ older adults, older adults with disabilities, and older adults who are immigrants or have limited English proficiency.

A. Advancing Equity and Supports for Underserved Communities

We appreciate the proposed rule's emphasis on modernizing the Older Americans Act (OAA) Regulations to reflect the needs of today's older adults. ACL's most recent Profile of Older Americans highlighted the growing diversity of older adults, reporting that in 2020, 24% of persons age 65 and older were members of racial or ethnic minority populations.¹ Recent events, including the COVID-19 crisis,

¹ Administration for Community Living, *2021 Profile of Older Americans* (November 2022), https://acl.gov/sites/default/files/Profile%20of%20OA/2021%20Profile%20of%20OA/2021ProfileOlderAmericans_508.pdf

revealed systemic inequities experienced by older adults. Racism and ageism are only two forms of systemic discrimination older people may face throughout their lives. Older adults who are women, people with disabilities, limited English proficient, immigrants, and part of the LGBTQ community also experience systemic inequities that create and sustain disparities in their health and economic security as they age. For older adults who live at the intersection of more than one of these communities, the discrimination and inequities they encounter intensify as they age.

It is important that the OAA regulations provide States, area agencies, and service providers with clear directives on how to focus services to communities with the greatest economic and social need and how to best serve underserved and marginalized communities, including Native American, Alaskan Native, and Hawaiian Native older adults, and older adults in congregate living settings. We also appreciate the opportunity to comment on the structures and programs, such as long-term care and nutrition services, that help underserved communities remain engaged and empowered.

Definitions: Greatest Social Need §1321.3

We applaud the expansion of the definition of “greatest social need” in §1321.3. This term is utilized throughout the OAA and accompanying regulations, and sets requirements for State and area agencies on how to prioritize and include participation, outreach, and services for underserved and marginalized communities. This definition is critical to ensuring that underserved and marginalized older adults equitably receive OAA-funded services. Many service providers, including legal assistance providers, rely on this definition to help them understand how to prioritize the delivery of services.

Noneconomic Factors: Race

We appreciate the inclusion of many of the noneconomic factors in the definition, including “sexual orientation, gender identity or sex characteristics;” “HIV status;” “Housing instability, food insecurity, lack of transportation, or utility assistance needs;” and “interpersonal safety concerns.” We strongly encourage ACL to implement these factors in the final rule. The factors that include LGBTQ+ older adults and those living with HIV/AIDS will help reduce discrimination against LGBTQ+ older adults and encourage the State units and area agencies to serve this community more effectively and consistently.

However, the definition as proposed does not sufficiently recognize communities of color as among those with the greatest need. Race is only addressed in the listed factor, “(8) Rural location or other cultural, social, or geographic isolation, including isolation caused by racial or ethnic status, that (i) Restricts the ability of an individual to perform normal daily tasks; or (ii) Threatens the capacity of the individual to live independently.” Isolation is not the only impact of racial or ethnic status, and in order to advance equity for older adults, the OAA regulations must recognize the impacts of race as people age. These impacts compound over the lifespan, leading to higher rates of poverty and homelessness, incarceration at higher rates, biases in health care systems contributing to health inequities, institutionalization in poorly performing nursing homes, and even premature death.² Older adults of color may be hesitant to seek or even be distrustful of OAA services due to a history of discrimination, trauma, and racism experienced when seeking services and supports. Therefore, it is even more critical for States and area agencies to prioritize and target outreach to communities of color.

² Farrell, TW, Hung, WW, Unroe, KT, et al. Exploring the intersection of structural racism and ageism in healthcare. *J Am Geriatr Soc.* 2022; 70(12): 3366-3377. doi:10.1111/jgs.18105.

<https://agsjournals.onlinelibrary.wiley.com/doi/10.1111/jgs.18105#jgs18105-bib-0018>

The OAA directs States, area agencies, legal assistance providers, and others to give particular attention to “low-income minority individuals.” The Office of Management and Budget (OMB) has minimum categories for those considered minorities, but such a list may leave out additional groups impacted by racism in a State or service area. Additionally, the term “minority,” is potentially dated and confusing in light of the changing demographics of older adults and the varied interpretations of the term. Some may interpret “minority” as communities with lower population representation than the majority population. However, the term “minority” may also be defined as those who have traditionally held minority status in the law or have otherwise been disadvantaged to a more dominant group, and therefore not tied to population.

We strongly recommend that the definition of greatest social need be amended to provide clarity and specifically include a noneconomic factor of “Belonging to a racial group who has been historically underserved, marginalized, and adversely affected by systemic racism and inequality.” This suggested factor aligns with language in Executive Order 13985, which calls for the Federal Government to “pursue a comprehensive approach to advancing equity for all, including people of color and others who have been historically underserved, marginalized, and adversely affected by persistent poverty and inequality.”

Needs as Further Defined by State and Area Plans

The proposed definition also includes as a factor “(10) Other needs as further defined by State and area plans based on local and individual factors.” We appreciate that this factor provides States and area agencies with flexibility to be responsive to the needs, conditions, and factors in a particular planning and service area. However, we recommend that clarification be added to this definition to specify that “other needs” identified by States and area agencies are *in addition to* the other factors listed in the definition and should be based on the most current and reliable data to ensure that definitions included in State and area plans are developed utilizing consistent sources of information. We recommend amending this factor to read (additions underlined):

(10) Other needs as further defined by State and area plans based on local and individual factors, and determined by utilizing best available data and feedback directly from communities of older adults;

We also recommend adding the following to the end of the full definition:

The specific noneconomic factors for determining greatest social need are the floor of the expectations for States and area agencies to utilize in prioritizing and targeting services. Any additional needs as further defined by State and area plans pursuant to factor (10), shall be applied in addition to the specific noneconomic factors listed in this definition and shall not take precedence over the specific noneconomic factors in this definition.

This clarification and addition will help ensure that the noneconomic factors specifically identified in the definition of “greatest social need” are not ignored or given less attention than the additional needs that a State or area agency may identify. We also recommend that this clarification and addition be applied to §1321.27(d)(1), which covers the content of the State plan, including how the State defines greatest social and economic need.

Definitions: Family Caregiver §1321.3

We appreciate the proposed rule's broader, more inclusive definition of "family caregiver" and the recognition of the key role family caregivers play in supporting older adults. The final rule should align with the 2022 National Strategy to Support Family Caregivers and require robust demographic and service provision data collection and sharing to track whether the National Strategy is meeting its goals.

Public Participation §1321.29

Meaningful participation by a wide range of diverse individuals is an important component of ensuring that the State plan will effectively address the needs of underserved and marginalized communities. We appreciate that the proposed rule calls for States to obtain the views of older individuals, caregivers, service providers, and those with the greatest economic and social need in developing and administering the State plan. We recommend that, similar to §1321.27(d)(1), the specific communities identified as those with the greatest social need be listed in this section to emphasize the full range of views that shall be obtained in the development and implementation of the State plan.

Additionally, we appreciate that §1321.29(d) specifies that the plan must be available for review in alternative formats and other languages. However, the proposed rule states that this is only available "if requested." We recommend amending this section to read (changes underlined):

Ensure the documents noted in (c) and final State plans and amendments are available to the public to review. The documents must also be available in the top twelve most commonly spoken non-English languages among limited English proficient individuals in the State, as determined by best available Federal and State data. The documents should also be available in alternative formats and other languages if requested.

This proposed change is modeled from state language access policies. New York's policy, for example, requires that the State must translate all vital agency documents into the top twelve most commonly spoken non-English languages among LEP New Yorkers based on Census data.³ We recommend that opportunities for public participation should follow, at a minimum, Civil Rights Act Title VI requirements around meaningful access for individuals with Limited English Proficiency, in addition to any State or local level requirements. The content of the State plan significantly impacts the services and supports available to older individuals in the State. Ensuring that it is accessible and attainable by older adults and others in the State supports the overall goal of the OAA and the regulations to empower older adults.

Serving Tribal Elders §1322

We appreciate the thoughtfulness of the proposed rules in focusing on the experiences of Native American, Alaskan Native, and Hawaiian Native older adults. Native elders play a vital role in maintaining traditions, customs and stories within their communities,⁴ but Native elders face tremendous health and economic disparities due to systemic barriers over centuries. The OAA plays a critical role in providing the services necessary for Native American, Alaskan Native, and Hawaiian elders to age safely in their homes and communities.

³ New York Executive Ch. 18, Art. 10 §202-a Language Translation Services.

⁴ National Indian Council on Aging, *Remembering Our Native Elders During Older Americans Month* (2023), <https://www.nicoa.org/remember-our-native-elders-during-older-americans-month/>.

Tribal Sovereignty

It is imperative for ACL to promulgate rules and deliver services in a manner that affirms and uplifts the sovereignty of Tribal governments, as reflected in §1322.21 and §1322.23. For example, §1322.21 empowers Tribal organizations to set minimum age requirements and additional eligibility requirements for service recipients. This provision not only respects that Tribal communities may define older adults or elders differently than the federal agency, but also recognizes that structural health disparities may lead to elders in Native communities displaying signs of aging-related disabilities at an earlier age than their white counterparts.⁵ Similarly, §1322.23 empowers Tribal organizations and Hawaiian Native grantees to develop their own criteria for prioritizing service delivery in a way that reflects the needs they identify in their own communities. We encourage ACL to emphasize Tribal sovereignty in this promulgation, as well as in all other rules, guidance, and programs impacting older adults.

Care Coordination

We emphasize the importance of coordination between States, localities, and Title III programs with Title VI programs and Tribal organizations, including as stated in §§1321.53, 1321.69, 1322.31, 1321.95. In particular, we support the proposed change to clarify that coordination is *required* under the OAA and that all entities, such as area agencies, State agencies, and service providers, must develop and maintain specific policies and procedures for such coordination (§1321.53). Such mandatory language, unlike permissive language, is important to ensure that all entities responsible for coordination of Title VI and Title III services are held accountable, and we encourage ACL to emphasize that coordination is required in sections that reference coordination. As such, we recommend that §1321.69(b) be revised to state that policies and procedures must also address the opportunities for funding and to serve on AAA boards, councils, and workgroups.

We also reiterate that such coordination should result in program development, outreach, and service delivery that is tailored to the needs of Native communities.

Culturally Appropriate and Trauma-Informed Services

We support changes that reflect culturally competent and trauma-informed practices in service delivery. A long history of trauma, as well as ongoing systemic inequities for Native Americans, Alaskan Native, and Native Hawaiians, has led to mistrust in government programs. It is imperative that OAA-funded programs are delivered to Native elders in a manner that affirms the diverse beliefs, languages, traditions, and practices of the many Native communities they seek to reach. We support the changes to §1322.17, which encourage culturally relevant and sensitive as well as trauma-informed practices in service delivery to Native elders, and particularly appreciate the addition of “family-centered” approaches. In §1321.69(a)(5) and §1321.95(e), we recommend revising the language to state “how services will be provided in a culturally appropriate and trauma-informed manner.”

Emergencies and Disasters

We support the proposed changes that will better enable OAA-funded programs to serve Native elders in instances of disasters or emergencies. Indigenous communities may be at a higher risk of adverse outcomes in both environmental disasters as well and public health emergencies.⁶ Native elders may

⁵ Centers of Medicare and Medicaid Services, AI/AN Age and Disability (2021), <https://www.cms.gov/outreach-and-education/american-indian-alaska-native/aian/its-ta-center/info/ai-an-age-and-disability>

⁶ Environmental Protection Agency, Climate Change and the Health of Indigenous Populations, (last updated 2022), <https://www.epa.gov/climateimpacts/climate-change-and-health-indigenous-populations>.

experience worse physical and mental outcomes as a result of climate change due to existing heightened rates of some chronic health conditions, infrastructure and institutional barriers, and a special connection to the land. Additionally, the COVID-19 emergency highlighted the extreme disparities that Native communities face in public health emergencies— in terms of health conditions, life expectancy, and financial implications.⁷ As such, we support the additional flexibilities that will allow Title VI programs to better serve Native elders in emergency and disaster situations (§1322.35 *et seq.*). Coordination between Tribal, State, and local organizations, as well as Title VI and Title III programs are particularly necessary in emergency situations that negatively impact Native elders.

Consolidation and Clarification

We also support the proposed changes to clarify Title VI and other provisions to better allow grantees to serve Native elders. Consolidating the sections referencing Title VI services to Indian Tribes and Native Hawaiian grantees creates more clarity in the regulations, which will permit grantees to better serve Native American, Alaskan Native, and Native Hawaiian older adults.

Improving Services and Supports for Older Adults in Congregate Living Settings

§§1324.11; 1324.13; 1324.21

We support the proposed rule’s provisions on State Long-Term Care Ombudsman programs. We also support the policies and procedures required by the State Ombudsman’s Office, as described in §1324.11.

Additionally, we support the language in §1324.13 regarding the functions and responsibilities of the State Long-Term Care Ombudsman. In particular, we appreciate the additional language that includes volunteers as part of the ombudsman program staff subject to training and certification, as well as the criteria for disclosure of records when the disclosure could cause harm to the resident, the ombudsman program, or other impacted parties. We also support the required adoption of memoranda of understanding between the Ombudsman program and legal assistance programs, long-term care facilities and providers, and other advocacy groups. Older adults utilizing long-term care greatly benefit from a multi-disciplinary system to ensure they are protected. However, too often, referrals between various aging groups lead to potential harmful delays. We encourage the State Ombudsman program to also include policies and procedures for a robust and accessible referral program among aging partners to timely address older adults’ needs.

We strongly support §1324.21 on conflicts of interest. Ombudsmen are trusted advocates for many older adults, and strong conflict of interest protections are necessary to maintain that trust. The proposed rule includes providers of long-term care services, including programs carried out through waivers under §§1115 and 1915 of the Social Security Act, as having possible conflicts that need to be identified and remedied. §1324.21(a)(9) also includes organizations that set “reimbursement rates for long-term care services” as possible conflicts but does not specifically mention managed care organizations (MCOs). Since MCOs typically receive capitated payments as opposed to reimbursements

⁷ National Institute of Health, Life Expectancy Loss among Native Americans During the COVID-19 Pandemics (2022), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8936100/#:~:text=COVID%2D19%20death%20rates%20in%20the%20young%20adult%20and%20middle,Native%20Americans%20in%20both%20years>; Household Experiences in American During the Delta Variant Outbreak, by Race/Ethnicity (2021), <https://www.hsph.harvard.edu/wp-content/uploads/sites/94/2021/10/EthnicityRWJFNPRHORP.pdf>.

for specific services, it is less clear that they are included in §1324.21(a)(9). MCOs are often criticized for having a financial incentive to enroll individuals in long-term services and supports, but with reduced services well below their capitated rate. For this reason, and given the growth of managed care in long-term services and supports, we strongly recommend MCOs be explicitly listed as a potential organizational conflict.

Nutrition §1321.87

We appreciate the addition of language on the need for services to address the incidence of hunger, food insecurity, and malnutrition; social isolation; and physical and mental health conditions when developing area plans. Lifting up underlying causes and outcomes helps to contextualize the impact of income security and healthcare on older adult nutrition, including the contribution of income programs like SNAP and SSI, and healthcare programs like Medicare and Medicaid. The proposed rule also provides an opportunity for States and local areas to evaluate how targeting services to individuals with the greatest need is addressing the incidence of hunger, food insecurity and malnutrition, social isolation, and physical and mental health conditions.

B. Legal Assistance

Older adults need a strong and well-supported national legal services network to promote and protect elder rights. Many of the issues faced by older adults have legal solutions, yet it is reported that older adult households do not receive any or enough legal help for 91% of their civil legal problems.⁸ We applaud ACL’s proposed changes to enhance the pathways to and provision of legal assistance by clarifying necessary expertise of providers, focusing on services that promote elder rights and autonomy, and meeting the needs of those with the greatest economic and social need. We also support the comprehensive guidance provided in §1321.93 to help guide the complicated issues related to confidentiality and referrals that can arise in the provision of legal services for older adults.

Provider Selection: Standards for Legal Assistance Provider Selection §1321.93(d)

We appreciate the proposed rule’s emphasis on the selection of providers who have the capacity to demonstrate expertise in a wide variety of legal issues affecting older adults. The requirements included in §1321.93(d) that delineate the standards for selection of legal assistance providers help ensure meaningful access to a full range of legal assistance and provider capability.

§1321.93(d)(1) of the proposed rule lists three legal priority areas— public benefits, residents’ rights, and alternatives to institutionalization. We recommend that §1321.93(d)(1) be revised so that it includes all of the legal priority areas listed in OAA §307(a)(11)(E) rather than only listing three. Listing only a few of the legal areas may lead to confusion about whether these specific legal issues should receive higher priority than the full scope of priority issue areas. This change would support the intent of the OAA and regulations and also unify §§1321.93(d)(1) and (d)(2). We recommend amending this section to read (additions underlined):

- (1) Retain staff with expertise in specific areas of law affecting older persons with economic or social need, including the priority issue areas identified in the Act.

⁸ Legal Services Corporation, Justice Gap Report (January 2021)

Contract Provision: Referral Systems §1321.93(e)(3)(i)

We strongly support ACL's inclusion of language in §1321.93(e)(3)(i) clarifying that area agencies are precluded from requiring a pre-screening to receive legal assistance or from being the sole and exclusive referral pathway for older adults to access legal assistance. The area agencies are an important partner and referral source for legal assistance providers. However, requirements such as pre-screenings and single pathway access to legal assistance create unnecessary barriers for older individuals seeking legal help, particularly in small or rural communities where people may be hesitant to share the details of a sensitive legal matter with an area agency. Additionally, an older adult may be seeking legal assistance related to an issue in which an area agency is an interested party, and allowing the area agency to be the exclusive referral pathway, could create additional barriers and conflict. The proposed rule in §1321.93(e)(3)(i) is also supported in the ABA Standards for the Provision of Legal Aid: Standard 5.4 on Protecting Client Confidences, which specifically speaks to the tension that may occur when asked to provide confidential information to a funding source, even when it is to account for the proper expenditure of funds.⁹ Standard 5.4 guides legal organizations not to reveal confidential information to funding sources unless required by law. We support §1321.93(e)(3)(i) remaining in the final rule.

Language Access §§1321.93(e)(3)(ii) and 1321.93(f)(2)(ix)

We applaud ACL's attention to the improvement of access to legal assistance for older adults with Limited English Proficiency (LEP). We suggest the following additions and clarifications to strengthen language access. These additions and clarifications should also be applied to 1321.93(f)(2)(ix).

In §1321.93(e)(3)(ii), we suggest the addition of language that discourages the use of laypersons (such as family members or children) as interpreters for older adult clients. Layperson interpretation, while convenient, is not sufficient for communicating the legal needs of clients. Further, the use of layperson interpretation may threaten the safety of older adults, as this type of interpretation may prevent the discovery of and enable further abuse and exploitation. Discouraging the use of laypersons as interpreters is consistent with the Administration's language access policies in other contexts. For example, the Administration recognized the harm in family and friends serving as interpreters in health care settings and proposes to require the use of "qualified interpreters" under a proposed rule implementing Section 1557 of the Affordable Care Act except under limited circumstances.¹⁰ We recommend amending §1321.93(e)(3)(ii) to read (additions underlined):

(ii) Requiring the contracted legal assistance provider(s) to maintain capacity to provide legal assistance in the preferred language used by older individuals seeking and/or receiving legal assistance who are limited English proficient (LEP), including in oral and written communication through qualified interpretation and translation services. In addition, legal assistance providers shall refrain from relying on untrained laypersons for interpretation, as these are inappropriate and may lead to dangerous or detrimental outcomes. Legal assistance provider(s) must also

⁹ American Bar Association, Standards for the Provision of Civil Legal Aid; Standard 5.4 Protecting Client Confidences.

https://www.americanbar.org/groups/legal_aid_indigent_defense/resource_center_for_access_to_justice/standards-and-policy/updated-standards-for-the-provision-of-civil-legal-aid/standard-5-4-on-protecting-client-confidences/

¹⁰ 45 CFR sec. 92.201(c)(1) <https://www.federalregister.gov/documents/2022/08/04/2022-16217/nondiscrimination-in-health-programs-and-activities>

ensure effective communication for individuals with disabilities, including by providing appropriate auxiliary aids and services where necessary.

In §1321.93(e)(3)(ii)(A), we also suggest adding language to provide clarity on the use of assessments of client’s understanding of the legal process. As currently worded, the “individualized assessment” seems to refer to assessing a client’s decisional capability, not their ability to communicate in their language of choice. It should be made clear that the term “individualized assessment” does not speak to a client’s decisional capability, but rather that the term stems from federal guidance implementing the prohibition against discrimination on the basis of national origin pursuant to Title VI of the Civil Rights Act. In that guidance, the Department of Health and Human Services iterated four factors that must be considered during an individualized assessment to ensure meaningful access for individuals with limited English proficiency. This is an opportunity to refer back to that guidance or reiterate the four-factor test in this OAA regulation. Therefore, to comport with the language access theme of the rest of §1321.93(e)(3)(ii), we suggest the following rephrasing (additions underlined):

(A) This includes requiring legal assistance providers take reasonable steps to ensure meaningful access to legal assistance by older individuals with limited-English proficiency, including ensuring that qualified interpretation and translation services are available for all client interactions in their preferred language as required under Title VI of the Civil Rights Act and the Department’s Revised LEP Guidance pursuant to Executive Order 13166.

In §1321.93(e)(3)(ii)(C), we also suggest the inclusion of language more closely mirroring Section 1557 referenced above. If §1321.93(e)(3)(ii)(C) is revised to closely conform to Section 1557, those served by legal assistance providers will receive the same level of language access as they do for health care services. This continuity ensures equity for older adults with limited English proficiency across a range of services and supports. For example, an older adult receiving medical services should be able to expect the same level of language access at their doctor as with a legal assistance provider who is assisting in their Medicaid appeal. We recommend amending this section to read (additions underlined):

(C) This includes taking appropriate steps to ensure communications with persons with disabilities are as effective as communication with others, including by providing appropriate auxiliary aids, qualified interpreters, and services where necessary to afford qualified persons with disabilities an equal opportunity to participate in, and enjoy the benefits of, legal assistance.

We appreciate the detail and attention provided in the proposed rule to ensure that language and communication services are embedded in the contracts between legal assistance providers and area agencies.

[Defense of Guardianship 1321.93\(d\)\(2\)](#)

We applaud ACL’s work to clarify the meaning of defense of guardianship and promote less restrictive and more person-directed forms of decisional support when possible. We suggest the following changes to promote consistency and further clarify the scope of the advice and representation available to older individuals at risk of or subject to guardianship.

Terminology & Clarification

In §1321.93(d)(2)(i), we first suggest replacing the terms “proposed protected persons” and “protected persons” with the terms “older individual at risk of guardianship” and “older individual subject to guardianship.” The term “older individuals” is defined in OAA §102(40). The term “older individuals at risk of guardianship” is utilized in OAA §731(5) as well as elsewhere in the proposed rule (§1324.303(a)(4), (5)). The term “individual subject to guardianship” is a defined term under the Uniform Guardianship Conservatorship, and Other Protective Arrangements Act (UGCOPAA §102(2)-(3)). Conversely, the terms “proposed protected persons” and “protected persons” are not used in the OAA or elsewhere in the proposed regulations. Although those terms might be familiar to practitioners in states where the terms have been codified into statute (Nevada, for example), they could be unfamiliar to practitioners in states that utilize other statutory terms. The use of the terms we propose here reflects the modern statutory trend, as reflected in the UGCOPAA, and promotes consistency with the OAA and the proposed regulations.

Second, we suggest adding the phrase “to enforce statutory and other rights within a guardianship” to clarify that an attorney plays a vital role not only at the initial adjudication stage of a guardianship case and at termination, but also during the course of a guardianship when the older individual is subject to the guardian’s and the court’s control. Even after a guardianship is granted, the older individual subject to guardianship continues to retain important statutory and constitutional rights that frequently require protection and enforcement by a qualified advocate. The addition of the proposed language is consistent with and supportive of the declaration in §1321.93(d)(2)(ii)(A) that defense of guardianship includes “assistance to preserve . . . an individual’s rights” and supports the OAA’s goal of protecting against abuse, neglect, and exploitation (OAA § 101(10)).

Third, we suggest replacing the term “revocation” with “modification” and “termination.” The term “revocation” normally implies some intentional act by a party to recall a power or void an instrument (revocation of a will or power of attorney, for example). That term is typically not associated with guardianship, while the terms “modification” and “termination” are fairly standardized and commonly used in guardianship statutes and parlance. For the same reasons, we suggest replacing the term “removing” in §1321.93(d)(2)(ii) with “modifying or terminating.”

Fourth, we suggest adding language to clarify that the term “guardianship” includes conservatorship and other similar fiduciary proceedings analogous to guardianship. “Guardianship” is not defined in either the OAA or the proposed regulations, and what that term encompasses varies significantly from state to state. Some states use “guardianship” to refer to oversight of both the person and the estate of an individual subject to guardianship. Other states (and the UGCOPAA) use “guardianship” to refer to oversight of the person and “conservatorship” to refer to oversight of financial matters. Still other states (specifically California) use “conservatorship” to refer to oversight of an adult and “guardianship” to refer to oversight of a minor. This lack of consistency could result in confusion about the services that can be provided from state to state, all depending on the state’s statutory definitions and designation of judicial proceedings. The term “other fiduciary proceedings” is used elsewhere in the proposed regulations (§ 1324.303(a)(4), (5)).

After incorporation of the revisions suggested above, §1321.93(d)(2) would read as follows (additions and changes underlined):

(i) Defense of guardianship means advice to and representation of older individuals at risk of guardianship and older individuals subject to guardianship to divert them from guardianship to less restrictive, more person-directed forms of decisional support whenever possible, to oppose appointment of a guardian in favor of such less restrictive decisional supports, to enforce statutory and other rights within a guardianship, to seek limitation of guardianship and to seek modification or termination of guardianship. The term guardianship, as used in this section, includes conservatorship and other fiduciary proceedings analogous to guardianship;

In §1321.93(d)(2)(ii), we suggest a revision to utilize the terms “older individuals at risk of guardianship” and “older individuals subject to guardianship” for consistency with the proposed change to §1321.93(d)(2)(i). The addition of “older individuals subject to guardianship” also reflects the need for attorney representation after the guardianship is granted in order to maintain the rights of older adults after adjudication and avoid abuse, neglect, and exploitation.

Exception to Defense of Guardianship

We also suggest two changes to the proposed exception to “defense of guardianship,” which allows a service provider to initiate a guardianship proceeding. The first suggested change clarifies that the restriction on service providers applies only to services provided utilizing OAA funds. In other words, the proposed language clarifies that a service provider who utilizes funds not received under the OAA is not subject to the restriction (and may utilize those non-OAA funds to represent a guardian). Although this principle appears to be expressed in other sections of the proposed regulations (for example, §§1321.93(a), (f)(1), (f)(2)(xi)(C), (f)(2)(xi)(E)), some service providers have expressed confusion on this point. Additionally, we suggest including a clarifying paragraph to this effect as subsection (f)(3)(v) as a direct instruction to service providers.

The second suggested change to the exception adds an additional element. As currently proposed, the exception requires that (1) the person seeking to become a guardian is an older adult, (2) no alternatives to guardianship are appropriate, and (3) no other adequate representation is available. We support this clarification and believe it to be a straightforward and logical reconciliation of the various provisions and requirements of the OAA, which prioritize defense of guardianship and the freedom, independence, and autonomy of older adults, while simultaneously allowing service providers to seek guardianship in limited circumstances. However, we continue to believe that commencing a guardianship action is inherently an attempt to curtail another individual’s rights and self-determination.

Thus, we see only two situations where filing for guardianship would not contravene the general intent of the OAA: namely, where the individual at risk of guardianship either consents to the imposition of guardianship or is otherwise physically unable to convey consent or objection. In both situations, the OAA’s prioritization of defense of guardianship is largely inapplicable because there is no defense to be raised. If the person facing guardianship consents to the imposition, the older adult’s wishes support the grant of guardianship, and allowing the adult’s wishes to govern in some sense actually furthers the OAA’s promotion of autonomy. If the person facing guardianship is wholly unable to express an opinion (e.g., is comatose or vegetative), the person cannot express their wishes or direct an attorney in their defense, so the need for guardianship is at least more apparent and the risk of an unnecessary or overly broad guardianship fairly low. To be sure, there is still a role for a zealous advocate even where the individual facing guardianship cannot convey their wishes or consent – namely the protection of the individual’s due process and statutory rights – but if the goal of the regulations is, at least in part, to

identify situations where the OAA’s allowance for guardianship makes sense in light of competing statutory language, these might be such situations.

After incorporation of the revisions suggested above, the relevant sections would read as follows (additions underlined):

§1321.93(d)(2)(ii)

(A) Representation to maintain the rights of older individuals at risk of guardianship and older individuals subject to guardianship, assistance limiting or modifying or terminating an existing guardianship, or assistance to preserve or restore an individual's rights or autonomy. No legal assistance provider(s) shall use funds received under the Act to represent a petitioner for imposition of a guardianship except in limited circumstances involving guardianship proceedings of older individuals who seek to become guardians, when no other alternatives to guardianship are appropriate, when the individual at risk of guardianship either consents to the imposition of a guardianship or is otherwise physically unable to convey consent or objection, and only if other adequate representation is unavailable in the proceedings;

§1321.93(f)(3)

(v) No legal assistance provider(s) shall use funds received under the Act to represent a petitioner for imposition of a guardianship except in limited circumstances involving guardianship proceedings of older individuals who seek to become guardians, when no other alternatives to guardianship are appropriate, when the individual at risk of guardianship either consents to the imposition of a guardianship or is otherwise physically incapable of conveying their consent or objection, and only if other adequate representation is unavailable in the proceedings.

Additional Clarifications

In section 1321.93(d)(2), it appears that subsections (iii), (iv), and (v) are numbered incorrectly. We suggest changing those subsections to (3), (4), and (5). If those subsections are renumbered, the citation in subsection (f)(2)(v) must be changed from (d)(2)(iv) to (d)(4).

In section 1321.93(e)(2)(i), the citation to the definition of “defense of guardianship” is incorrect and should be changed from (c)(1)(ii)(B)(1)(ii) to (d)(2)(i)-(ii).

In section 1321.93(f)(2)(iv), the citation to the definition of “defense of guardianship” is incorrect and should be changed from (c)(1)(ii)(B)(1)(ii) to (d)(2)(i)-(ii).

Legal Assistance Provider Requirements §1321.93(f)

We applaud the inclusion of provisions for legal assistance providers under contract with State agencies or area agencies. We specifically appreciate the focus on providing a range of services that impact an older adult’s independence, choice, or financial security; the maintenance of expertise and capacity to handle issues under priority case types; and the focus on providing services to those with economic or social need.

We also support the focus on capacity to provide legal assistance to older adults in both community and congregate living settings, including developing partnerships with the Long-Term Care Ombudsman Program.

We recommend an addition to §1321.93(f)(2)(ii)(A) and to §1321.93(f)(2)(vii). These sections clarify that legal assistance providers should maintain the expertise and capacity to deliver a range of legal assistance, including representation in administrative and judicial proceedings. This is important to ensure that when more in-depth representation is needed, legal assistance providers are engaging in services beyond brief service and advice. However, we recommend the inclusion of language that would include representation in mediation and restorative justice proceedings. For older adults who have experienced abuse, mediation or restorative justice offers a means to recover funds or other remedies in a manner that mitigates or avoids further harm. This is particularly significant for communities of color and other communities who have experienced discrimination and who justifiably may mistrust traditional judicial settings. Further, restorative justice practices offer the opportunity for healing and alternative forms of accountability. These practices have the potential to help advocates engage with older adults who otherwise may be reluctant to engage with traditional criminal justice systems in addressing their abuse and exploitation.¹¹ We recommend that this proposed change also be applied to §1321.93(d)(2)(iii).

Legal Assistance Developer §1324.303(a)

We appreciate ACL's clarification of the role of the State Legal Assistance Developer (LAD), particularly the inclusion of §§1324.303(a)(4) and (5), which speak to ensuring State capacity to promote financial management services to older individuals at risk of guardianship and capacity to assist older individuals' understanding of their rights and less restrictive alternatives to guardianship. This aspect of the role of the LAD will support the defense of guardianship work of legal assistance providers, as defined in §1321.93(d)(2).

We recommend that ACL consider the following addition to §1324.303(a)(6) (additions underlined):

(6) State capacity to improve the quality and quantity of legal services provided to older individuals.

(i) In so doing, the Legal Assistance Developer shall take into consideration the promotion of activities that improve outreach and coordination between legal assistance providers and Title VI Program Directors and Tribal organizations to increase access to legal assistance for Native American, Alaskan Native, and Hawaiian Native older adults.

The most recent Title VI survey report identified legal assistance as one of the top unmet needs of Tribal elders, with 36% of Title VI programs reporting legal assistance as a significantly unmet need, and more than 80% reporting at least some unmet need in this area.¹² The LAD, in their role of ensuring State capacity to improve the quality and quantity of legal services provided to older individuals, is in a good position to ensure that steps are being taken to address this unmet need.

¹¹ American Bar Association, May 24, 2022, In Elder Abuse Cases, Restorative Justice Holds the Promise of Honoring Relationships, Lisa Nerenberg, https://www.americanbar.org/groups/gpsolo/publications/gpsolo_ereport/2022/may-2022/elder-abuse-cases-restorative-justice/

¹² USAgging & Miami University; National Survey of Title VI Programs 2020 Report: Serving Tribal Elders Across the United States. <https://www.usaging.org/Files/TitleVI-Survey-Report-508.pdf>

Emergency & Disaster Requirements: Coordination §1321.97

We applaud the inclusion of provisions for emergency preparedness and response. The recent COVID-19 pandemic and natural disasters have disproportionately impacted older adults, particularly older adults in marginalized communities. We appreciate the focus on coordination of services, opportunity for flexibilities, and specific support for Native American elders.

We recommend revisions to §§1321.97(a)(1)(ii), 1321.97(a)(3), and 1327.97(b)(2). As currently proposed, these sections call for plans to coordinate activities with various entities, such as area agencies on aging, local emergency response, and others. Legal assistance providers are not currently listed in these sections. While legal assistance is a contracted service through the area agencies or State unit, we recommend specifically including language to include legal assistance providers in plans for coordination activities. In the COVID-19 pandemic and natural emergencies, we have seen legal assistance as a key service for older adults to assist with issues such as obtaining and appealing decisions on disaster relief, accessing public benefits, protecting nursing facility residents' rights, and securing housing. Specifically including legal assistance providers in this section will ensure that State and area disaster plans include steps to connect older adults to these important services in the event of a disaster and in coordination with other key services.

In addition to legal services, we recommend explicitly requiring coordination with the Long-Term Care Ombudsman. Disasters place residents in congregate care settings at particular risk, and the Long-Term Care Ombudsman program can help to protect residents' rights, connect them with additional services, and aid in transitions from these facilities.

Lastly, we recommend explicitly requiring plans to include coordination with Medicaid managed care organizations (MCOs). MCOs are increasingly responsible for the delivery of health care to older adults and play an essential role in disasters.¹³

Conclusion

Thank you again for the opportunity to provide input on the Update to ACL's Older Americans Act Regulations notice of proposed rulemaking. If any questions arise concerning this submission, please contact me at sgalvan@justiceinaging.org.

Sincerely,



Sarah Galvan
Managing Director, Elder Rights
Justice in Aging

¹³ © Kailes, J.I., Health Plan Member-Focused Emergency Practices Roadmap, 2021, Edition 1 (available at www.jik.com/mrp.html)