



August 11, 2023

Administration for Community Living  
U.S. Department of Health and Human Services

Dear Assistant Secretary Barkoff,

The California Association of Area Agencies on Aging (C4A), representing all 33 Area Agencies on Aging (AAAs) in California, is pleased to submit comments from C4A members and staff related to recent regulatory changes proposed by the Administration of Community Living (ACL). We will address major themes and make additional comments and requests for your consideration. We would be happy to discuss any of these comments further if ACL staff would like to do so.

**Theme One: Contracting and Commercial Contracts**

This section is of greatest concern to C4A members. We understand that Sec. 212 of the Older Americans Act (OAA, Act), along with language in Sec. 306(a)(13)(B)(i), states that contracts and commercial relationships require approval by the State Unit on Aging (SUA), and that the proposed regulations would require the SUA to establish a process by which AAAs and contracted community providers would receive that approval.

It appears that ACL is interpreting the approval process to include commercial relationships where no OAA funds are involved. **C4A does not agree with the view that the Act requires state approval for contracts and commercial relationships that are outside of OAA funding.**

In fact, **C4A believes that Sec. 306(g) of the Act provides a basis for *not* requiring SUA approval: "nothing in the Act shall restrict [AAAs] from providing services not provided or authorized by the Act, including through 1) contracts with health care payers; 2) consumer private pay programs; or 3) other arrangements with entities or individuals that increase the availability of home and community-based services and supports." An SUA approval process would by its very nature be restrictive.**

Until Congress can clarify its intentions in 2020 through the 2024 reauthorization process, we ask that ACL's proposed regulatory language encourage "flexible and streamlined" processes to "promote and expand the ability of the aging network to engage in business activities". With that in mind, **we request that ACL either: 1) not include regulation on this issue (i.e., by striking 1321.9(c)(2)(xiv)) or 2) set an implementation date well past the next reauthorization**



**process to allow Congress the opportunity to weigh in on the appropriate role of SUA oversight of contracts and relationships that do not involve OAA funding.**

**If ACL decides to require SUA approval of commercial contracts, we urge ACL to ensure that any state approval and monitoring processes involve the least invasive requirements possible (e.g., no Single Audit requirement), and that approval should not be part of the Area Planning process, since that process is focused on activities related to the Act.**

### **Theme 2: Conflicts of Interest: Legal Assistance, Guardianship, and Ombudsman Programs**

C4A believes that is reasonable and appropriate for ACL to stipulate that the majority of OAA legal assistance dollars spent on guardianship issues be limited to defense of guardianship. However, **we do not agree that a state or AAA's role in providing OAA legal assistance presents an irremediable Conflict of Interest (COI) with playing a role in the state or local guardianship system.**

**Regarding legal assistance, we are concerned that robust regulations:**

- **May make it difficult for recipients to find legal providers that can meet all the proposed regulatory requirements, especially in rural areas; and**
- **Do not reflect the AAA role in providing I&R and other screening or assessment activities, particularly related to access to legal services. Legal assistance is just one of many services coordinated by the AAAs and it should not be so siloed and weighed down by regulations that it limits the holistic and person-centered approach to all OAA services that the Act demands. ACL should strike the language in 1321.93 (e)(3)(i) that precludes the AAA from pre-screening older adults seeking legal assistance.**

AAAs serve in the role of public guardianship or guardians of last resort because they are the best option in their community to provide high-quality services when guardianship cannot be avoided. **We believe it is critical to have robust firewalls between these functions to avoid real or perceived COI, but banning AAAs from serving as a public guardian is not in touch with the realities on the ground, nor in the best interest of the limited number of older adults who are currently under AAA guardianship, nor dictated by the Act.**

**While guardianship is never the ideal, it is necessary in some cases, including when individuals are living with dementia or facing other significant barriers in functioning. ACL should avoid any regulatory language that indicates that the two different roles cannot, with**



appropriate firewalls, be managed ethically and efficiently by a AAA. Anything else would be an overreach and potentially put older adults currently receiving guardianship services from the AAA at risk of a less appropriate and supportive guardian.

**§ 1321.57 Organization and Staffing of the area agency is relevant here: What is considered a AAA legally under federal and state law? Just the services provided under the OAA or all programs within the local department that houses the AAA? To help achieve an innovative and coordinated system of care, a COI policy must include clear direction concerning how individual autonomy for recipients will be preserved for as long as it's safe to do so; when a public guardian program is involved there should be full service coordination under the Act.**

ACL has also raised questions about whether there is COI in a state (and presumably a AAA) operating the OAA LTC Ombudsman Program and Adult Protective Services. **C4A believes any real or perceived COI between these two functions can also be remedied by clear COI policies and firewalls.**

**For example, we propose adding language to § 1324.13(c)(2)(iii) and (d) to require that all staff and volunteers of the Ombudsman program who have access to resident records, as well as other files, records, and information subject to disclosure requirements, be trained and certified as designated representatives of the Office, so that individuals with access to confidential information will be accountable to the Ombudsman for their actions.**

### **Theme 3: Nutrition Services**

We very much appreciate ACL's proposal to give states the option of allowing Title III CI congregate meals funding to be used for limited "shelf-stable, pick-up, carry-out, drive-through, and other similar meals." C4A also supports proposed language that would expand eligibility for home delivered meals and clarifies that individuals are not required to be homebound to receive a home-delivered meal. Concerning:

- **Grab and Go.** ACL should increase the ceiling from 20 to 40 percent as the appropriate C1 to C2 transfer limit as a proportion of all congregate dollars. This recommendation is based on input from C4A members and reflects the Aging Network's need for maximum flexibility to respond to local and changing needs
- **Home-Delivered Meals.** C4A appreciates the clarification that a home-delivered meals recipient does not need to be entirely homebound to remain eligible, as well as the language that makes clear that eligibility criteria "may include consideration of an



individual's ability to leave home unassisted, ability to shop for and prepare nutritious meals, degree of disability ... "

- **We believe that AAAs should be able to offer these flexibility options in their PSA even if their SUA has not implemented a statewide policy.** We appreciate ACL's efforts in looking for consistency across states, but are concerned that these efforts limit the ability of AAAs to respond to local need in the most flexible ways possible. A modestly staffed SUA may be reluctant to adopt the options due to the added paperwork or complexity, limiting the AAA's ability to take a person-centered approach with its clients.

#### **Theme 4: Funding Flexibilities Across Programs**

AAAs in California have a variety of suggestions for increasing funding flexibility in various programs, including:

- § 1321.9 (c) (2)(iii) Transfers - **Set maximum transfers at 25%, except between C1 and C2 where maximum transfers would be set at 40%**, to allow sufficient flexibility for allocations among programs while ensuring that IIB services would continue at an acceptable level
- § 1321.9 (c) (2)(iv) State, Territory and Area Plan Administration – **Strike "(C) Any amount of State resources included in the Title III maintenance of effort certification that exceeds the minimum amount mandated becomes part of the permanent maintenance of effort; and..."**. **Some members felt that it may be a disincentive for states to provide more than the minimum amount of funds if additional state funds are included in maintenance of effort.**
- 1321.57(a)(2) Organization and Staffing of the Area Agency –
  - **Request removal of prohibition on AAAs having purposes other than a AAA.** Increases flexibility to expand service offerings and funding sources
  - **Suggest new language to fine tune AAA definition:** "(a) An area agency may be either: (1) An agency whose single purpose is to administer programs for older persons and family caregivers; or (2) A separate organizational unit within a multi-purpose agency which functions as the area agency on aging."
- 1321.99 Setting aside funds to address disasters and 1321.101 Flexibilities under a major disaster declaration –
  - **Amend language to allow use of funds to prepare for and respond to a disaster**
  - **Recommend increasing time of AAA executive staff from 5 to 15 hours.** **Recommend increasing time of service providers from 7 to 15 hours.** Allocation formula should consider local work to engage and educate key stakeholders, impacted clients, and community providers.



- **AAA and service provider training costs should also increase** to allow all staff to receive the training.
- § 1321.3 Definitions – **Expand the definition to allow for use of disaster funds for a local disaster that has been declared by either the federal or state government.** E.G. Wildfires
- § 1321.9 State agency policies and procedures - **Revise the match requirement from 25% to 15% to be in line with the requirement for other services.** In states where the state does not contribute to the match the full 25% is passed down to the local level which becomes a burden for rural and small AAA's that do not have providers that are large enough to make the match.
- § 1321.9 (c) (2)(iv) State, Territory and Area Plan Administration -
  - **Area plan administration costs set at 10% are insufficient to fulfill current administrative requirements under the Act. We support an increase to 15%** as is normative in healthcare and other sectors.
  - **ACL should support SUA efforts to provide advance and streamlined funding to AAAs/service providers to the extent that it is able**

### Clarifications and Definitions

C4A requests that language be clarified or added, and definitions be expanded or included in the proposed regulations, including for:

- § 1321.65(b)(2) Submission of an area plan and plan amendments – **Suggest the following amendment:** “the area agency shall identify populations within the planning and service area at greatest economic and great social need, which shall include the following populations ***when data is available to identify those populations.....***”
- § 1322.21(b) Client eligibility for participation- **This section leaves out any assessments based on greatest social or economic needs. Request language be added.**
- § 1321.63 Area agency advisory council – **Request language to Clarify that the Advisory Council does not function as an approving body,** but rather a review group that partners with AAAs to make recommendations.
- § 1321.73 Policies and procedures. **Define** what would constitute an “***independent*** qualitative and quantitative monitoring process.”
- § 1321.93-Legal Assistance - **Check for consistency:** Page 65 states to serve the people with the greatest economic need whereas page 71 states, "The proposed rule precludes a legal assistance program from asking an individual about their personal or family financial information as a condition of establishing eligibility to receive legal assistance."



- § 1321.3 Definitions - **Please provide definition of the scope of a neurological or organic brain dysfunction.** It's not clear whether individuals with cardiovascular or metabolic disorders leading to cognitive decline would be included within the scope of the current definition.
- § 1321.9 (c)(2)(xv) Buildings, Alterations, Renovations, Maintenance and Equipment- **Please define "alterations", "renovations", and "construction".**
- §1321.81(b) Client Eligibility for Participation (Title III) – **Suggest language be developed** that the State, area agencies on aging, and local service providers may develop further eligibility requirements **together, not independently.**
- § 1322.17 Purposes of services- person and family-centered, trauma informed – **Suggest the following language be included:** "Person centered services may include community-centered and family-centered approaches consistent with the traditions, practices, beliefs, and cultural norms and expectations of" the older adult being served be part of Title III (Section 1321.77).
- § 1322.27(a)(3) and (a)(4) Nutrition - **Inconsistent Statement?:** States Title VI programs MAY provide nutrition counseling, as appropriate, based on the needs of meal participants. In Title III (section 1321.87(a)(3) it says "...SHALL provide nutrition education, as appropriate, based on the needs of meal participants."
- § 1322.29(b) family caregiver support services - **Inconsistent Statement?:** Respite care is available to pay an unpaid family caregiver in Title VI, but not in Title III? Can this be fixed in the regulations or does bringing III in alignment with VI require statutory change?
- § 1322.31 Title VI and Title III Coordination – **Request clarification** on how this process will ensure that all local tribal organizations and Area Agencies will have meaningful and useful input to the process so that it works locally?

**Policy Objectives Agreement**

Finally, C4A agrees with the following major points included in the proposed regulations:

§ 1321.87	Support "innovative service delivery options" for meals.
§ 1321.87 Nutrition services	Agree with the flexibility language as COVID did set a precedence and show an immense need for flexibility around nutrition service delivery.



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§ 1321.101	Agree with proposal to allow State agencies up to 90 days after an MDD expiration to obligate funds for disaster relief.
§ 1321.101	Agree with five percent of admin for statewide procurement of items during an MDD and for flexibilities with regular program requirements during an MDD
§ 1324.303	The proposed language seems reasonable.
Greatest Economic Need	Fully support expanding definition of "greatest economic need" to better represent the population in service areas of AAAs.
§ 1324.303 Legal Assistance Developer	Often legal remedies are the only ones available, and our legal service system needs more support from the state. Very important to avoid conflicts of interest for this position so that it can really function as intended.

Thank you for the opportunity to comment on the proposed regulations. Once again, we are available to speak with ACL staff about any and all of the above comments and suggestions.

Sincerely,

*Laura Trejo*

[Laura Trejo \(Aug 11, 2023 14:27 PDT\)](#)

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