August 13, 2023

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

RE: Comments regarding ACL notice of proposed rulemaking (NPRM) to modernize the implementing regulations of the Older Americans Act of 1965
(Submitted electronically via http://www.regulations.gov)

On behalf of the Michigan Long Term Care Ombudsman Program and its twenty local ombudsmen, several volunteers, and five state staff members, we have prepared the following comments in response to the RIN-0985–AA17, Older Americans Act (OAA) Regulations.

We are providing comments which relate to experiences and challenges faced by the state ombudsman staff, paid and volunteer ombudsman, and the designated entities in providing ombudsman services to residents of long term care homes in Michigan. Our comments include sections where additional clarification is needed to eliminate confusion, misinterpretation, and misapplication of program requirements.

General comments

The Older Americans Act (the Act) sets out several features of the Long Term Care Ombudsman Program (LTCOP) that are uncharacteristic of other programs and services created by and funded under the Act including:

1. State ombudsman's responsibility to establish program policies and procedures;
2. Confidentiality of program information including the viewing of and releasing confidential program records and disclosure of information;
3. Advocating on behalf of residents through individual case resolution and through systemic advocacy (which is not lobbying); and
4. Responsibility for fiscal management of the dedicated funding sources for the LTCOP.

Specific Comments and Recommendations

Comment #1. 1324.1 – Definition of *Official duties*

We appreciate the proposed changes at 1324.1 to the definition of "Official duties" to help clarify the role of representatives of the Office. We also note that the proposed language does not capture the following:

- The state ombudsman, who is missing from this definition, also has official duties, functions, and responsibilities. The role of the state ombudsman is just as likely to be "misunderstood by third parties who deal with the program," as noted on page 39598 regarding representatives.
- The term "duties" alone is not reflective of the rest of the regulation or the Act. In numerous instances, both the Act and existing federal regulations use additional terms such as "functions," "functions and duties," "functions or responsibilities," "official functions, responsibilities, and duties," and other combinations of these terms.
- The phrase "under the auspices of" is not sufficiently comprehensive. Some of the official duties performed by representatives are delegated by the state ombudsman (e.g., discretionary decisions regarding disclosure), not merely performed "under the auspices" of the state ombudsman.
- The new language incorrectly states that representatives represent the program. Per the existing regulations, representatives represent the Office of the "Ombudsman" not the "program."
- The new language incorrectly states that the work is conducted "pursuant to the Long-Term Care Ombudsman Program." However, the work is conducted pursuant to federal and state law.

Therefore, we recommend the following changes:

> *Official duties, functions, responsibilities, or any combination of these terms,* as used in section 712 of the Act (42 U.S.C. 3058g) and this subpart ~~with respect to representatives of the Long-Term Care Ombudsman Program,~~ means work conducted by the Ombudsman or representatives, pursuant to ~~the Long-Term Care Ombudsman Program authorized by~~ the Act, 45 CFR 1324, subpart A, and/or State law and carried out under the auspices and general direction of, or by direct delegation from, the State Long-Term Care Ombudsman.

Comment # 2. 1324.1 – Definition of Resident Representative

We support the effort to provide clarity. However, the changes have resulted in grammatically incorrect sentences, making the definitions more difficult to understand.

Therefore, we recommend the following changes:

> *"Resident representative"* means any of the following:
>
> (1) An individual chosen by the resident to act on behalf of the resident in order to:
>
> a. support the resident in decision-making;
> b. access ~~to~~ the resident's medical, social, or other personal information;
> c. manage~~ment of~~ the resident's financial matters; or
> d. receive ~~pt of~~ notifications pertaining to the resident;

(2) A person authorized by State or Federal law (including but not limited to agents under power of attorney, representative payees, and other fiduciaries) to act on behalf of the resident in order to:

a. support the resident in decision-making;
b. access ~~to~~ the resident's medical, social, or other personal information;
c. manage~~ment of~~ the resident's financial matters; or
d. receive ~~pt~~ notifications pertaining to the resident;"

Comment #3. 1324.11(e) – Policies and procedures

We appreciate the existing language at 1324.11(e) which recognizes state authority for the Ombudsman to lead the development of policies and procedures in consultation with the State agency. Give this language, some of my fellow State Ombudsman still report ongoing difficulty in developing or updating program policies and procedures due to the confusion over the authority to do so, resulting in delayed implementation of important program standards. This confusion also leads to policies and procedures not being developed by those closest to the program who are charged with leading the program and ensuring positive outcomes for those we serve. **We would encourage ACL to consider exploring statutory authority for State Ombudsman to carry out this important function.** It would ensure that we are recognized by the State agency and other agencies hosting the ombudsmen, as having the authority to develop and implement program policies and procedures which are critical to our responsibility for program operation, monitoring, and service delivery.

We support the effort to provide clarity in regards to promptly responding to complaints under 1324.11(e)(1)(v) but are still unsure of the meaning of the language.

Therefore, we recommend the following changes to 1324.11(e)(1)(v):

"Standards to ~~assure~~ ensure prompt response by the Office and/or local Ombudsman entities to complaints, with ~~prioritizing~~ priority given to complaints regarding abuse, neglect, exploitation, and complaints that are time-sensitive ~~complaints and that consider~~. At a minimum, the standards shall require consideration of the severity of the risk to the resident, the imminence of ~~the threat of~~ potential harm to the resident, and the opportunity for mitigating harm to the resident through provision of Ombudsman program services."

Comment #4. 1324.11(e)(2)(iv)(C) – Procedures for access

We support the new language at 1324.11(e)(2)(iv)(C) to provide ombudsman access to resident records in situations where the resident is unable to communicate consent and has no legal representative. This additional provision allows ombudsmen to access critical information necessary to investigate concerns and advocate on behalf of the most vulnerable residents who are without representation. Allowing access to these residents' records ensures equal provision of ombudsman services for all residents regardless of ability to consent or status of a legal representative.

Comment #5. 1324.11(e)(3) – Disclosure

We support the new language at 1324.11(e)(3)(iv) requiring standard criteria be developed for making determinations about disclosure of resident information when the resident is unable to provide consent and there is no resident representative, or the resident representative refuses to consent to the disclosure. Standardized criteria will ensure consistent decision making by the Ombudsman in determining whether to disclose resident information under these circumstances.

We also support the new language at 1324.11(e)(3)(v) on the prohibition on requirements for reporting abuse, neglect, or exploitation. This additional language supports the Ombudsman program's requirements for confidentiality and disclosure as well as clarifies previous confusion regarding mandated reporting and its applicability to the Ombudsman program.

Comment #6. 1324.11(e)(6)(i) – Designation

We support the proposed change at 1324.11(e)(6)(i) to remove "adequately". We feel this change allows for less ambiguity regarding the Ombudsman's determination in remedying a conflict of Interest.

Comment #7. 1324.11(e)(8) – Determinations of the Office

Section 1324.11(e)(8) describes specific ways that the Office makes determinations independent of the agency in which it is organizationally located. The items listed in the current regulation are narrow and should be noted as examples, not a finite list of functions. Decisions regarding complaints and information contained in the Ombudsman's annual report are examples of other determinations that must be made independently, yet it is impossible to make an exhaustive list. Therefore, we recommend that the stem of the paragraph be modified, changing "regarding" to "including" to make clear that the items listed below it are examples. Also, because Ombudsmen report a lack of certainty about whether the content of their annual report is to be independently developed, it would be helpful to add the annual report as an example to this list as proposed below.

We agree that the language requiring independent decisions and determination by the Ombudsman are necessary and support clarifying language regarding policies and procedures with proposed modifications shown below. In addition, the independent determinations of the Office require regulations that establish these positions through more than the development of policies and procedures. Based on numerous Ombudsman experiences such as being subject to content reviews and edits by superiors within the agency hosting the Ombudsman Program, we also recommend a modification to section 1324.15(b) regarding requirements of State agency responsibilities related to the Ombudsman program.

Therefore, we recommend the following changes:

> ***"****Determinations of the Office.* - Policies and procedures related to the determinations of the Office must ensure that the Ombudsman, as head of the Office, shall be able to independently make determinations and establish positions of the Office, without interference and shall not be constrained by or necessarily represent the or positions of the State agency or other agency in which the Office is organizationally located, ~~regarding~~ including:

(i) Disclosure of information maintained by the Ombudsman program within the limitations set forth in section 712(d) of the Act (42 U.S.C. 3058g(d));

(ii) Recommendations to changes in Federal, State and local laws, regulations, and other governmental policies and actions pertaining to the health, safety, welfare, and rights of residents; ~~and~~

(iii) Provision of information to public and private agencies, legislators, the media, and other persons, regarding the problems and concerns of residents and recommendations related to the problems and concerns~~.~~, and

(iv) development and issuance of an annual report as described in 1324.13(g)."

Comment #8. 1324.13(e)(2) – Disclosure

We support the new requirement to develop criteria in determining whether to disclose the files, records, or other information of the Office. We believe this new requirement will result in a more objective process.

Therefore, we recommend the following changes:

"Criteria for disclosure of records shall consider if the disclosure has the potential to ~~cause~~:

i. Cause retaliation against residents, complainants, or witnesses,
ii. ~~Undermining of~~ Undermine the working relationships between the Ombudsman program, facilities, or other agencies; or
iii. ~~Undermining of~~ Undermine other official duties of the program;"

Comment #9. 1324.13(g) – Annual report

We support proposed changes at 1324.13(g) to clarify the Ombudsman's annual report is in addition to the NORS report. Therefore, we recommend adding reference to 1324.11(e)(8) to the proposed language in 1324.13(g) to also clarify that the report content is ultimately determined by the Ombudsman without required approval or subject to modification by another person within the Ombudsman's host agency. In addition, we recommend adding the word "disseminate" to clarify that the ombudsman annual report must be released either in addition to, or separate of, a host agency's annual report**.**

Therefore, we recommend the following changes:

"(g) Annual report. In addition to the annual submission of the National Ombudsman Reporting System report, the Ombudsman shall independently develop, disseminate, and provide final approval of an annual report as set forth in 1324.11(e)(8) and section 712(h)(1) of the Act (42 U.S.C. 3058g(h)(1)) and as otherwise required by the Assistant Secretary."

Comment #10. 1324.13(h) – Memoranda of Understanding

We support having a Memoranda of Understanding (MOU) between the Ombudsman programs and legal assistance programs. We also support having an MOU between the Ombudsman program and state survey agency responsible for the licensing and certification of long term care provider in order to facilitate ombudsman access to licensing and certification records. However, we recommend language to address the following four areas: (1) the need to require access to *unredacted* records; (2) the need to require access to all records, including

enforcement and surveying records; (3) the possibility for interference and delay regarding "communication protocols;" and (4) the possibility for confusion and overreach regarding "sharing information."

(1) The need to require access to <u>unredacted</u> records: The proposed language regarding MOUs should expressly state that access to unredacted records is required. Access to unredacted information is needed for Ombudsman programs to provide <u>timely</u> advocacy for residents, as required by the Act and the current regulations. Based on existing MOUs between Ombudsman programs and licensing and survey agencies, we believe this request is justified as it can reduce administrative burden, records can be safely transmitted as ombudsman must maintain confidentiality of the records received, records are necessary for ombudsman to complete their duties related to case closing, monitoring complaints to the state agency, and evaluating outcomes, and ombudsmen are more fully informed leading to stronger advocacy for resident outcomes.

(2) The need to require access to <u>all</u> records: The new language should include "surveying" in order to mirror language already used elsewhere in the rule. See, e.g., § 1324.11(a)(1). The new language should also expressly include "enforcement" records. While such records are necessarily a part of licensing records, it is important to specifically state this requirement because in some states' enforcement records are segregated from other licensing records. The state licensing agency may differentiate records by use of terms such as "business" records, complaint "intake" records, "investigator" records, investigator "notes," statements of deficiencies, investigation summary records, informal dispute resolution records (for facilities to appeal citations), and others.

(3) The possibility for interference and delay regarding "communication protocols": We strongly object to the requirement of MOUs between Ombudsman programs and licensing entities regarding "communication protocols." Such MOUs are not needed and could cause significant delay and confusion in ombudsman work—especially in areas where current regulations already address "communication" under § 1324.11(e)(5)(ii). This clear and simple mandate could easily be weakened by a broad requirement for "communication protocols." A required MOU on communication protocols could lead to unintentional interference in these areas by non-ombudsman individuals in state licensing entities. **Therefore, we recommend avoiding all of these unintended consequences (and potential interference in ombudsman work) by eliminating the proposed requirement for MOUs regarding communication between Ombudsman programs and State licensing entities.**

(4) The possibility for confusion regarding "sharing information": The inclusion of "procedures to share information" in the proposed language at § 1324.13(h)(1)(ii) may incorrectly suggest that an MOU will suddenly allow Ombudsman programs to "share" protected identifying information with licensure programs when in fact, federal law sets forth strict disclosure requirements for Ombudsman program records. To be clear, we absolutely support the requirement of an MOU with licensing entities, but we recommend that the requirement be <u>limited</u> to existing federal language regarding "access to" licensing records by Ombudsman programs, rather than the proposed language of "sharing information."

Therefore, to address the four concerns explained above, we recommend the following changes to the proposed language in § 1324.13(h)(1)(ii). ***We also note that our recommended changes comport with the Act's use of the term "all" records at 42 USC 3058g(b)(1)(d).***

"The required adoption of memoranda of understanding between the Ombudsman program and ….

Facility and long-term care provider licensure, surveying, and certification programs, addressing at minimum ~~communication protocols and procedures to share information including~~ procedures for access of the Ombudsman Program to unredacted copies of all licensing, surveying, and certification records, regardless of format, maintained by the State, including but not limited to enforcement records, with respect to long-term care facilities;"

Comment #11. 1324.15(b) – Authority and access

We recommend that Section 1324.15(b) is modified to ensure a State agency implements the various requirements of Part 1324 in the establishment and operation of an Ombudsman program with the necessary authority to perform its functions. By removing the narrow reference to policies and procedures related to access in 1324.11(e)(2), the requirement is broadened to capture all relevant methods of implementation that are not directly related to access but essential to the functions, responsibilities, and duties of the Office.

In addition, independence encompasses more than the limited circumstances identified in 1324.11(e)(8), yet there are no regulations directed to the State agency to ensure that the Office operates independently within whatever organization it is housed.

Therefore, we recommend adding paragraph (2) to clarify to the State agency its role in ensuring that the Office acts independently of the State agency or other agency in which the Office is located.

"(b) *Authority ~~and access~~.* The State agency shall ensure that:

(1) through the development of policies, procedures, and other means, ~~consistent with § 1324.11(e)(2),~~ ~~that~~ the Ombudsman program has sufficient authority as described in this part, to fully perform all of the functions, responsibilities, and duties of the Office; and

(2) the Office acts independently of the State agency or other agency in which the Office is organizationally located in the performance of its functions, responsibilities, and duties under this part."

Comment #12. 1324.15(j)(i) – Legal Counsel

We support the revised language that clearly defines the requirements for the State agency to ensure the Ombudsman program has access to legal counsel which is a critical component to our systemic advocacy work, a necessary resource for Ombudsman case consultation with representatives of the Office, and an effective tool for prioritizing legislative activities. We appreciate the additional requirements throughout this subsection which provide clarity on the State agency's role in ensuring effective legal counsel is readily available to the Ombudsman program.

Comment #13. 1324.15(k) – Fiscal Management

We strongly support the new language for State agency responsibilities related to Ombudsman program fiscal management. This language clearly defines the expectations for the State agency to provide critical information for the Ombudsman to efficiently and effectively manage the fiscal components of the Ombudsman program for which they have full responsibility. This

language aligns with the regulatory requirements at 42 CFR 1324.13(f) and will help eliminate confusion or disparities we have seen in State agencies across the nation.

Comment #14. 1324.21(a)(6) – Conflicts of interest

We support the language at 1324.21(a)(6) that offers additional clarification throughout the subsection on conflicts of interest. We believe these requirements reflect the guidance previously provided by ACL to the Ombudsman for the identification and remedy or removal of an individual or organizational conflict of interest. The additional language will help clarify any confusion that exists over what constitutes a conflict for the Ombudsman program.

Comment #15.1324.303(a) – Legal Assistance Developer

We strongly support a single individual to serve full-time as the Legal Assistance Developer (LSD) with any additional needed personnel. We believe this is necessary to implement the extensive requirements of this position. We understand that many individuals currently serving in this role have the responsibility of overseeing or supporting multiple aging service programs and may not have adequate time to dedicate to legal services to provide the attention required to successfully lead the legal assistance development program. We also recognize that this is an under- or un-funded mandate and would support funding allocated specifically to the LSD to support State agencies to fully implement the requirements.

Therefore, we recommend the following changes:

> "(a) In accordance with section 731 of the Act (42 U.S.C. 3058), the State agency shall designate an individual who shall be dedicated to serve full-time ~~be known~~ as a State Legal Assistance Developer, and other personnel, sufficient to ensure-"

Comment #16. 1321.1 – Definition of *Official duties*

We appreciate the proposed changes at 1321.1 to the definition of "Official Duties" to help clarify the role of representatives of the Office but feel additional clarification is needed.

As detailed in our comments at 1324.1, we recommend the following changes at 1321.1:

> *"Official duties, functions, responsibilities, or any combination of these terms,* as used in section 712 of the Act (42 U.S.C. 3058g) and this subpart ~~with respect to representatives of the Long-Term Care Ombudsman Program,~~ means work conducted by the Ombudsman or representatives, pursuant to ~~the Long-Term Care Ombudsman Program authorized by~~ the Act, 45 CFR 1324, subpart A, and/or State law and carried out under the auspices and general direction of, or by direct delegation from, the State Long-Term Care Ombudsman."

Comment #17. 1321.1(c) – Each state designates one State agency to-

Subsection 1321.1(c)(2) authorizes the State agency to administer Title III and VII funds under the state plan and the Act and 1321.1(c)(7) authorizes the State agency to provide funds as set forth in the Act to area agencies on aging or local service providers but it does not address the allocation of funds to the Ombudsman program under Title III.

The Act clearly allows for the allocation of Ombudsman funds as follows: section 303(a)(2) authorizes use of Title III-B funds for Ombudsman activities; section 321(a)(10) permits use of supportive services money for "services of an Ombudsman at the State level to receive,

investigate and act on complaints by older individuals who are residents of long-term care facilities and to advocate for the well-being of such individuals."; and section 304(d)(1)(B) specifies that "such amount as the State agency determines to be adequate for conducting an effective Ombudsman program under section 307(a)(9) shall be available for conducting such a program."

Therefore, given this authority for the State agency to allocate funds to the Ombudsman program, we strongly recommend the following language be added at 1321.1(7) to reflect allocation of funds for the Ombudsman program.

> "(7) Provide funds as set forth in the Act to the Ombudsman program or the agency hosting the Ombudsman program and to either:
>
> (i) Area agencies on aging under approved area plans on aging, in States with multiple planning and service areas, for their use in fulfilling requirements under the Act and distribution to local service providers to provide direct services, or
>
> (ii) Local service providers, in single planning and service area states, to provide direct services."

Comment #18. 1321.7 – Organization and staffing of the State agency

We support the additional language in 1321.7(c) which recognizes the State Ombudsman as the head of the Office and requires adequate additional staff to carry out the duties of the program as required by the Act. The additional language in 1321.7(d) provides helpful clarification where conflicts exist between the Act and state law or statute.

We also appreciate the new language in 1321.7(e) which provides needed support and oversight for the development of legal services programs for older individuals. Often residents served by the Ombudsman program are unable to access necessary legal services due to financial constraints and the status of living in an institutional setting. Ensuring adequate services are readily available is critical to this population in resolving guardianship concerns, involuntary discharge, covered service termination, surrogate decision maker appointment, and other critical issues that affect the rights and quality of life for these residents.

Comment #19. 1321.9 – State agency policies and procedures

More recently developed Ombudsman regulations at 45 CFR 1324.11(e) require the Ombudsman to develop program policies and procedures in consultation with the State agency. We interpret the language at 1321.9 to require the State agency to follow the requirements at 1324.11(e) for Ombudsman program policies and procedures development and implementation. We believe subsection 1321.9 would require the State agency to monitor the programmatic and fiscal performance of the Ombudsman program. We would appreciate confirmation regarding the accuracy of our interpretation and if it reflects the intent of this new language.

We understand that the OAA is written to designate the State agency as the main party for carrying out the OAA. However, parts of the OAA specifically require that the Long-Term Care Ombudsman Program (LTCOP) is an independent program, significantly different than other programs under the OAA.

Therefore, we recommend adding a section (4) under 1321.9(a) related to State agency policies:

> "(4) The policies developed by the State agency shall implement Section 1324.15(i) relating to the prohibition of interference with, retaliation and reprisal against the Ombudsman program. Such policies shall address the way the Ombudsman is protected from interference, retaliation, and reprisal by a representative of the State agency, area agency on aging and other providers."

Comment #20. 1321.9(vii) – Funding for the State LTC Ombudsman Program

We strongly support the inclusion of the new language in 1321.9(vii) that requires State agencies to maintain program funding requirements and verify such maintenance through verification completed by the Ombudsman. Although we have supported bringing the regulations into alignment with the Act, we would recommend not including a specific fiscal year in the regulations as it is subject to change in the Act, but rather include language in the regulations that references the year in the Act.

Therefore, we recommend the following changes to 1321.9(vii)(A).

> (A) *Minimum Certification of Expenditures.* The State agency must expend not less than the amount expended by the State agency under Title III and Title VII of the Act for the Ombudsman program in the fiscal year ~~2019~~, as ~~required by~~ so identified in the Act.

Comment #21. 1321.49 – Intrastate funding formula

We recommend an additional change to the language in 1321.49(e)(1) for Title VII B funds related to distribution through the intrastate funding formula (IFF). The Act at §304(d)(1)(D) requires states to utilize an intrastate funding formula to allocate Title III funds but does not address application of the IFF to Title VII funds.

Therefore, we recommend the following change to 1321.49(e)(1) to reduce confusion over the application of the IFF on Title VII funds.

> "(1) Title VII funds are not ~~required to be~~ subject to the intrastate funding formula."

Also, we appreciate and support the new language in 1321.49(e)(2) allowing State agencies the flexibility to **not** apply the intrastate funding formula to the Title III B funds allocated to the Ombudsman program. Often States utilize a funding formula specifically for the Ombudsman program which typically considers the unique demographics of the population to be served as well as geographic variations of service areas where services are delivered through area agencies on aging.

Comment #22. 1321.61 – Advocacy responsibilities of the area agency

We recommend a change to recognize that although the State agency and area agencies have advocacy responsibilities, the Act provides that the State Ombudsman must set the public policy and advocacy strategy for the Ombudsman program regardless of where the Office resides (in or outside of the State agency) to avoid conflicts of interests and set a policy agenda that prioritizes the needs of long-term care residents and the Ombudsman program.

The State agency and area agencies may operate, contract, or have pecuniary interests in advancing their agenda such as case management, home care, and managed care. When State agency and area agencies' priorities are for services other than for long-term care facility

residents, those residents are not being served in an equitable manner with other older adults and individuals with disabilities.

Therefore, we recommend the addition of section (b)(6) as follows:

> "(6) Ensure that when the agency hosts a local Ombudsman entity, it permits Ombudsman representatives to carry out systems advocacy in accordance with policies set forth in Section 1324.11(e)(5)."

Comment #23. 1321.63 – Area agency on aging advisory council

We support the Ombudsman program being identified as a potential member as a service provider of the Area Agency Advisory Council under 1321.63(b)(5). Ombudsman involvement on the Area Agency Advisory Council supports the coordination and collaboration between various service programs of the area agency which strengthens overall support and service delivery to older individuals.

Comment #24. 1321.67 – Conflicts of interest

We support the new language under 1321.67 for agency policies and procedures to comply with Ombudsman conflict of interest requirements in subsection 1324.21. The additional language supports consistency and removes any possible confusion over the responsibility for screening for and remedying or removing a conflict of interest for the Ombudsman program for individuals and agencies.

Comment #25. 1321.71 – Purpose of service allotments under Title III

New 1321.71(a), which is currently 1321.63(a) removes Ombudsman services from the list of Title III services to receive funds. This implies that Title III funds cannot be expended on ombudsman services, which is incorrect. In addition, removal of ombudsman services from subsection (a) makes the reference to subsection (c) less clear without the context of the previous reference to the allowable services.

Section 303(a)(2) of the Act authorizes use of Title III-B funds for ombudsman activities at both the state and local levels at, "such amount as the State agency determines to be adequate for conducting an effective Ombudsman program under section307(a)(9)…". Regarding the Ombudsman program, the Act states that Title III-B, "shall be available for conducting such a program." States report uncertainty regarding this provision, and we believe it would be helpful to bring attention to it as ACL promulgates its rules.

Therefore, we recommend that ACL add a new subsection or modify an existing subsection to Section 1321.71 to explain the allowable use Title III-B funds for Ombudsman services.

Comment #26. 1321.75 – Confidentiality and disclosure of information

We strongly support the new language in 1321.75(b) regarding any Ombudsman program information that is protected by disclosure provisions under 45 CFR 1324. This language helps clarify the Ombudsman's obligation to protect program records and not disclose them to any State agency, area agency, or auditing agency. Often there is

confusion over the access to and release of program records and other information. We believe this revised language should eliminate any confusion.

Comment #27. 1321.81 – Client eligibility for participation

We recommend adding a clarifying phrase to this regulation to reinforce the equity of serving residents of all ages in long-term care facilities. We recommend expanding the language under 1321.81 to include the Ombudsman program to the list of explicit exceptions to allow service provision to all long-term care residents.

Therefore, we recommend adding section (4) under 1321.81(a):

> "(a) An individual must be age 60 or older at the time of service to be eligible to participate in services under the Act, unless the Act otherwise provides an explicit exception. Exceptions are limited to the following specific services:
>
> (1) Nutrition services:…
>
> (2) Family caregiver support services for…
>
> (3) Services such as information and assistance and public education…
>
> (4) Ombudsman services."

Comment #28. 1321.83 – Client and service priority

We believe there is a conflict with the language at 1321.83(b) regarding identifying criteria for being given priority in the delivery of services under Title III, Parts B, C and D and the role of the Ombudsman program to serve all residents in licensed long term care settings. The Ombudsman program serves residents defined at 711(6) of the Act as "The term ''resident'' means an individual of any age who resides in a long-term care facility." The Act does not provide for a subpopulation of residents to be served, rather in defining Ombudsman responsibilities, the Act refers consistently to "residents". Given the requirement of the Act to serve all residents, the language in this section contradicts the ombudsman service delivery requirements and we recommend excluding Ombudsman program services from client and service priority requirements.

Therefore, we recommend the following change:

> **"1321.83 – Client and service priority.**
>
> (a) The State agency and/or area agency shall ensure service to those identified as members of priority groups through assessment of local needs and resources.
>
> (b) The State agency and/or area agency shall identify criteria for being given priority in the delivery of services under Title III, Parts B, C and D, with the exception of services provided by the Ombudsman program, in accordance with the Act and guidance as set forth by the Assistant Secretary for Aging."

Comment #29. 1321.93 – Legal assistance

Under 1321.93(c), Ombudsman programs struggle to meet the needs of residents facing a variety of legal issues. With legal assistance resources being so scarce, we fully support preserving services to represent older adults at grave risk of being deprived of the basic human right to make their own decisions. We agree that the most inappropriate use of these limited funds would be to represent a petitioner for guardianship of an older person except in the rarest

of circumstances, where the resident would be a risk of greater harm if the petitioner could not secure legal representation. We agree with the limited exceptions ACL provided and would support inclusion of such language in the regulations. These situations should be extremely limited as typically a hospital, nursing home, other health care provider, or adult protective services agency applies for guardianship, negating the need for legal representation. Resources should be focused on educating and assisting older adults in completing advance directives to avoid guardianship through powers of attorney and surrogate or supportive decision making, where state law or statute provides for such options.

We also recommend that legal services should be prioritized to serve all individuals who are facing the loss of his or her home, whether in the community in a single-family dwelling or in a long-term care facility. Many older adults and individuals with disabilities need assistance urgently. They often are on limited budgets including limited minutes on their phones. Legal services should prioritize these calls so that individuals do not need to wait on hold for many minutes, hoping to talk with a legal services provider to help those facing imminent eviction.

We recommend adding language to 1321.93(d)(iv) to require the Legal Assistance Developer to be an individual dedicated full-time to the position. We believe this is necessary to implement the extensive requirements of this position. We understand that many individuals currently serving in this role have the responsibility of overseeing or supporting multiple aging service programs and may not have adequate time to provide the attention required to successfully lead the legal assistance development program.

Therefore, we recommend the following change:

> "(a) In accordance with section 731 of the Act (42 U.S.C. 3058), the State agency shall designate an individual who shall be dedicated to serve full-time ~~be known~~ as a State Legal Assistance Developer, and other personnel, sufficient to ensure-"

We support the addition of new language in 1321.93(d)(iv) and (f)(vii) and thank ACL for the attention being given to Legal Assistance services for older adults.

In addition, with regard to language under 1321.93(f)(4)(ii)(A), we propose additional language to ensure individuals providing legal services do so in accordance with the requirements of the Ombudsman program as offered in (6) below:

> "(1) Communicating with a governmental agency for the purpose of obtaining information, clarification, or interpretation of the agency's rules, regulations, practices, or policies;
>
> (2) Informing a client about a new or proposed statute, executive order, or administrative regulation~~,~~ relative to the client's legal matter;
>
> (3) Responding to an individual client's request for advice only with respect to the client's own communications to officials unless otherwise prohibited by the Act, Title III regulations or other applicable law. This provision does not authorize publication of training of clients on lobbying techniques or the composition of a communication for the client's use;
>
> (4) Making direct contact with the area agency for any purpose;
>
> (5) Testifying before a government agency, legislative body, or committee at the request of the government agency, legislative body, or committee~~.~~; or
>
> (6) Complying with Part 1324 Subpart A relating to the state long-term care ombudsman program."

Comment #30. 1321.101 – Emergency & Disaster Requirements

During the recent COVID Public Health Emergency, Ombudsman programs continued to operate and adjust service delivery to ensure residents were represented and supported during that difficult time. It was crucial for Ombudsman programs to continue to receive full funding to ensure that any additional costs associated with responding during the emergency did not become a barrier to service delivery. Given the unique requirements of the Ombudsman program, we suggest that Ombudsman program funding be prohibited from reallocation to other service programs during an emergency or disaster. We propose adding language under 1321.101(c) to exclude Ombudsman program funding from disaster relief flexibilities. We also seek clarification on "within open grant awards" to fully understand the possible implications of this new language.

Therefore, we recommend the following change:

> "(c) Expenditures of funds under disaster relief flexibilities must be reported separately from the grant where funding was expended. State agencies may expend funds from any source within open grant awards under Title III or Title VII of the Act, except for such funds allocated to the Ombudsman program, but must track the source of all expenditures."

We appreciate the opportunity to provide comments to ACL as it continues its process of reviewing and clarifying regulations that govern the Long Term Care Ombudsman Program and other programs under the authority of the Older Americans Act, as amended. We appreciate the on-going support of the ACL leadership and look forward to continuing to engage in discussions to strengthen the Long Term Care Ombudsman program on behalf of those we serve in licensed long term care settings.

Sincerely,

Salli A. Pung
State Long Term Care Ombudsman