LIBERATORS FOR JUSTICE

A NATIONAL COALITION TO ADVANCE RIGHTS TO SELF-DETERMINATION

LIBERATORS FOR JUSTICE (L4J) STATEMENT AND PUBLIC COMMENTS ON ADULT PROTECTIVE SERVICES FUNCTIONS AND GRANT PROGRAMS NOTICE OF PROPOSED RULEMAKING

Rule Name: Adult Protective Services Functions and Grant Programs
Docket ID: ACL-2023-0002 | Document Citation: 88 FR 62503 | Document No.: 2023-19516.pdf (govinfo.gov) | Proposed modifications to 45 CFR Part 1324

Administration for Community Living
Administration on Aging, Attention: ACL-AA17-P
330 C Street SW
Washington, DC 20201

November 09, 2023

To Whom It May Concern:

Liberators for Justice (L4J) is a coalition that supports an individual's right to exercise choice and control over their lives. We strongly oppose the use of guardianship as a tool for institutionalization and other rights infringements against people with disabilities. Guardianship, by diminishing our self-determination, dignity, and community participation, is wholly incompatible with the Independent Living philosophy and the disability rights movement. Protection and restoration of rights are central to L4J's work. L4J and its members utilize first-hand experiences to advocate for people with disabilities at serious risk of protective services intervention, guardianship and institutionalization.

Despite laws protecting fundamental rights to self-determination and community integration in the United States, our nation remains behind other nations in ensuring the autonomy and liberties of older adults and people with disabilities, and one of the mechanisms that sets us behind is the unfortunate pipeline from Adult Protective Services to guardianship and institutionalization. Just this year, Mexico abolished guardianship by passing their National Civil and Family Procedure Code. As ACL and other state and federal entities seek to strengthen rights to self-determination, L4J hopes that the example of a

society without the threat of guardianship becomes the beacon we follow and the objective we work toward.

We appreciate this opportunity to respond to the Notice of Proposed Rulemaking (NPRM) that has been put forth to modify regulations for the Older Americans Act of 1965 (the Act, or OAA) as drafted by the Administration for Community Living (ACL) within the Department of Health and Human Services (''the Department'' or HHS), which proposes a new subpart (Subpart D) related to Adult Protective Services (APS). We ask that you accept this letter as public comment.

Abuse of Guardianship

Due to insufficient oversight, uniform guidance, and reporting, it is impossible to identify the number of people experiencing unnecessarily restrictive guardianships and institutionalization. Therefore, L4J supports ACL's proposal to introduce stronger programmatic and fiscal policies and procedures. State agencies must be mandated to develop and implement transparent policies and procedures under the Act that address such areas as conflict of interest and dual relationships, reporting, coordination of services, staff training, and methodology.

Over the past couple years, L4J has witnessed the troubling use of APS interventions to place significant numbers of individuals with disabilities under unnecessary guardianship, to remove them from their homes and their communities by institutionalizing them against their will. Additionally, our membership across several states has fielded numerous complaints about APS agencies engaging in or permitting guardianship abuse and financial exploitation. Many of these complaints involve conflicts of interests (COI) within State Units on Aging (SUAs), Area Agencies on Aging (AAAs), and APS.

We ask that you consider the following comments on specific sections of this NPRM.

Section 1324.404 COI Policies and Dual Relationships

The NPRM states: "Conflicts of interest may arise when a State employee, APS worker, or APS system's financial or personal interests influence, or are at odds with, the interests of a client or cohort of clients... Individual APS workers may face conflicts of interest if they are in a 'dual relationship' serving multiple roles for a single client… We propose these dual relationships be permitted only when unavoidable and that conflicts of interest be appropriately mitigated. We further propose that APS programs have policies and procedures that ensure conflicts of interests are avoided and, if found, remedied. These procedures could include firewalls and disclosure requirements. We seek comment on whether our proposal reflects the universe of actual and potential conflicts of interest, those who may be a party to a conflict, and ways in which we may strengthen these requirements while not placing undue programmatic or administrative burden on APS systems."

Comment:

> **L4J strongly disagrees with ACL's proposed allowance of "dual relationships" of any kind.** Due to the massive civil rights and dignity implications that can result from an APS investigation, we support the development and adherance to policies and procedures that entirely eliminate COIs in APS programs.

L4J is particularly troubled by conflicts of interest that arise when an APS is overseeen by its region's AAA, especially when the AAA functions as a guardian. In this situation, when APS staff petition for guardianship they refer an "alleged incapacitated person" to their AAA, introducing conflicts of interest in the determination process. This pipeline to guardianship is at risk of being driven by unprincipled – typically financial – incentives. L4J and its members have witnessed large numbers of individuals placed under unnecessary guardianship and institutionalization because, in wielding their guardianship powers and neglecting alternatives, AAAs fail to ensure consumer rights to self-determination and community access.

With respect to proposed Section 1324.405, Accepting Reports, potential conflicts also impact whether an APS will accept a report alleging the maltreatment of a person under AAA guardianship.

Therefore, L4J opposes AAAs and APS from being appointed as guardian and adamantly objects to the dual relationships, COIs and percieved COIs as a result of AAA oversight of APS without involvment of an objective third party.

L4J recommeds that if such conflicts or dual relationships are found, a CIL advocate be assigned and hold the authority to ensure objectivity, as well as the rights and autonomy of those individuals subject to guardianship.

Section 1324.406 Coordination with Other Entities

The NPRM states: "[ACL seeks] comment as to whether we have accurately captured the scope of appropriate entities with which APS should collaborate, and whether our proposal would create unintended consequences for APS programs. We also seek examples of where coordination is working and where barriers to coordination exist."

Comment:

L4J supports ACL's efforts to require that states improve communications and transparency between these entities to ensure coordination in the investigation of abuse, neglect, and exploitation. L4J has identified a lack of coordination nationally between Centers for Independent Living and AAAs (who often oversee APS programs) and urges that ACL reverse this trend by promoting and elevating CILs as essential partners in these functions.

The interagency and intergovernmental promotion of CIL services will positively impact the fundamental human and civil rights of consumers in areas of autonomy, health, home, finances, personal property, and privacy. L4J respectfully requests that changes to the rule exceed the current proposal by ensuring that people at risk of guardianship or institutional placement due to an APS investigation be appointed a CIL advocate. To ensure adherence to an individual's state protective plan, a CIL advocate shall be appointed unless the consumer refuses the service and there is proof of consumer denial.

To improve the quality of interagency coordination, L4J recommends that ACL mandate APS staff trainings on how to protect consumers' fundamental rights to self-determination and

community access and how to coordinate with CILs to ensure these protections. L4J further recommends that these training be performed by disability-led organizations.

Section 1324.408 State Plans

The NPRM states: "State entities must develop and submit to the Director of the Office of Elder Justice and Adult Protective Services, the position designated by 42 U.S.C. 3011(e)(1), a State APS plan that meets the requirements set forth by the Deputy Assistant Secretary for Aging."

Comment:

The submission of plans do not ensure or verify compliance. For example, Ohio's 10-year correction plan remains unaddressed, while the state's entities proceed in their activities without accountabilty or consequences, impact on funding or sanctions. **L4J recommends that ACL clearly define the timeline and process for correcting a defective plan.** L4J supports enforceable accountablity and oversight of non-compliant and deficient states with a one- to three-year deadline for reaching full compliance prior to defined penalties.

Scopes of Function and Definitions

In Background, the NPRM states: "The focus of APS is entirely on assisting the victim to recover from the experience of maltreatment."

Comment:

L4J recommends that prevention be an essential function of APS activities, with reporting requirements advancing an outcome of deterrence. A broad cost-benefit analysis should make conservative assumptions about the value of a statistical life and apply it to deaths averted by enhanced reporting requirements. (The methodology for doing so is discussed below in the comments on the cost-benefit analysis provided in the NPRM.FR Page 62504.)

Additionally, **L4J recommends that "suspicious death" be a category of maltreatment in APS investigations and reporting.** Such deaths of older adults and people with disabilities are likely underreported, and the lack of a working category for APS investigations and reporting only exacerbates the potential for neglect in this area.

In Definitions, the NPRM states: "Emergency Protective Action means emergency use of APS funds to purchase goods or services, immediate access to petitioning the court for temporary or emergency orders, and emergency out-of-home placement. "

Comment:

L4J believes this definition perpetuates institutional biases by not including critical community-based funding for emergency housing and in-home community-based services and supports, and reinforces the APS pipeline to undesired guardianship and institutional placement.

In Definitions, the NPRM states: "Financial exploitation and exploitation are used interchangeably in the OAA, and exploitation for the purposes of adult maltreatment in this proposed rule is likewise confined

to illegal, unauthorized, or improper acts related to the personal finances of an adult … (for example, exploitation does not encompass labor rights violations)."

Comment:

> Disallowing a labor component in the definition of exploitation marginalizes the detrimental effects of subminimum wage labor often associated with people with disabilities under guardianship who may be working against their will while remaining financially dependent on a guardianship system. If ACL expects entities and agencies with enforcement authority to intervene when rights and laws (such the Fair Labor Standards Act) are violated, they ought to be explicit about this in the new regulation and inform the public that they are working with the Wage and Hour Division in the Department of Labor to ensure compliance. **L4J recommends that ACL broaden the definition of exploitation, to align it with its common meaning to encompass labor**.

In Footnote 23 the NPRM states: "Individual input was received from the APS community, thus exempting the process from Federal Advisory Council Act [FACA] requirements."

Comment:

> Receiving input in this manner appears to be an end-run around FACA requirements. Why did ACL determine that collecting information in this manner (one party at a time) would be superior to following the intent of FACA, which is to broaden sources of input, allow for wider public input, and provide for transparency? **L4J requests that ACL publicly release all unpublished APS community comments with the submitting entity's name attached to each comment.**

Comments on the cost-benefit analysis in support of the NPRM requirements

L4J generally supports the discussion of costs associated with the new reporting requirements. The costs included a simple calculation of the wage times the number of hours for a total cost for an activity. That method is appropriate and sound.

The discussion of benefits is more complex, simply because many of the benefits are inherently qualitative, while the costs are simple market prices times quantities. Improvements in the quality of life are inherently qualitative. The benefits are not something directly bought and sold in a market and are fraught with externalities and public goods (the benefits are not limited to one person, so markets are not particularly feasible for exchanging such goods.) That means costs and benefits might be in different units. Cost can be expressed in dollars. To be able to compare costs and benefits on a quantitative basis, assumptions must be made about the dollar value of the benefits.

The discussion of the benefits of the proposed rule, as stated in the NPRM are not as concrete as those of the costs giving the costs more weight in the public's mind, so L4J proposes the benefits be more explicitly calculated and provided. What follows is a statement and example of standard methodology for doing so.

In Discussions of Benefits, the NPRM says: "According to 2022 NAMRS data, four percent or approximately 36,000 APS clients died during the course of an APS investigation." One can make the very

conservative estimate that 10% of these deaths could have been avoided if the new reporting requirements were in place (3,600 lives).

EPA uses a concept referred to as the "value of a statistical life" (VSL), which uses various methodologies to arrive at that value, including "willingness to pay." While that methodology has issues, it can provide a lower bound for the value of life. EPA's current statement on the subject is: "EPA recommends that the central estimate [of VSL] of $7.4 million ($2006), updated to the year of the analysis, be used in all benefits analyses that seek to quantify mortality risk reduction benefits regardless of the age, income, or other population characteristics of the affected population until revised guidance becomes available. (Mortality Risk Valuation | US EPA) Mortality risk is exactly the endpoint this Proposed Rule seeks to address.

The VSL 2006 number increases with the price level and now is about $10 million per statistical life, or death averted.

If we conservatively estimate the number of deaths averted due to the new reporting requirements is 10% of 36,000 (3,600) and the value of a statistical life is $7 million per statistical life, (again, conservatively) the benefits from the new rule are $25.2 billion. That number demonstrates that the proposed rule results in benefits exceeding its costs, for all cost categories identified in the NPRM. However, a separate calculation of this type can be made for financial abuse, as well, which would increase the expected benefits of the rule. It is also reasonable to use EPA's current VSL of $10 million demonstrating benefits of about $36 billion.

Many other benefit categories (such as making the reporting period mandatory with a specified reporting period) can also contribute to deaths averted in a tangible way so these benefits can be included in the value of deaths averted calculation.

We recognize other agencies, including those in HHS, use other value of statistical life methodologies in developing their required benefit cost analyses, per OMB requirements. EPA probably uses the highest of all values, but that seems appropriate for this exercise.

Thank you for your time and attention to these critically important concerns.

Respectfully,

Liberators for Justice
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