NAELA
NATIONAL ACADEMY OF ELDER LAW ATTORNEYS

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August 15, 2023

Amy Wiatr-Rodriguez
Director of Regional Operations
Administration for Community Living
Department of Health and Human Services
330 C Street SW
Washington, DC 20201

via www.regulations.gov

Re: Older Americans Act: Grants to State and Community Programs on Aging; Grants to Indian Tribes for Support and Nutrition Services; Grants for Supportive and Nutritional Services to Older Hawaiian Natives; and Allotments for Vulnerable Elder Rights Protection Activities (ACL-AA17–P)

Dear Ms. Wiatr-Rodriguez:

As advocates for older adults, people with disabilities, and their families, we appreciate the opportunity to comment on this Notice of Proposed Rulemaking (NPRM), focused on the Older Americans Act.

NAELA represents over 4,000 elder law attorneys and 31 chapters, with members in every state and even some abroad. We are the only professional, non-profit association of attorneys that conditions membership on a commitment to the Aspirational Standards for the Practice of Elder and Special Needs Law Attorneys. Extending beyond the benchmark set by the American Bar Association's Model Rules Professional Conduct, these standards recognize the need for holistic, person-centered legal services to meet the needs of older adults, people with disabilities, and their caregivers. Supporting the dignity and independence of these vulnerable populations is at the center of what we do.

NAELA supports modernizing the OAA regulations to conform to statutory changes and to clarify certain standards, particularly for area agencies on aging (AAA) and the legal assistance providers that they fund through the OAA. These regulations, when finalized, will create greater uniformity and consistency regarding access to justice for older adults and their family caregivers. Our comments center on the changes proposed under 45 CFR 1321.93 (Legal Assistance) and specifically guardianship, the responsible use of non-attorneys in the provision of legal assistance, and the proposed emphasis on serving those in greatest economic and social need.

Legal Assistance (Section 1321.93)

The NPRM proposes clarified selection criteria for legal assistance providers. Consistent with one of the overall goals of the NPRM to enhance benefits for OAA participants, particularly those in greatest economic need and greatest social need consistent with the statute, 45 CFR 1321.93, as proposed, specifies standards for the contracts between the area agencies on

aging and the selected legal assistance providers. For example, the NPRM requires the legal assistance provider to demonstrate capacity to prioritize representation and advice that focus on the specific areas of law that give rise to problems that are disparately experienced by older adults with economic or social need. The contract must also require the area agency to perform outreach about the availability of legal assistance to address problems experienced by older adults that may have legal solutions, including outreach to older adults with the greatest economic need due to low income and to those with greatest social need, including older adults of color and older adults of underserved communities (e.g., limited-English proficiency, severe disabilities, rural residents, those at risk for institutional placement, and those with neurological and organic brain dysfunction and their caregivers). NAELA agrees with these proposals because OAA-funded legal assistance plays a critical role in reaching the most vulnerable older adults who would not otherwise be afforded legal assistance due to their scarce resources or systemic barriers, and NAELA is deeply committed through our own Diversity, Equity, and Inclusion principles to advocate for all stakeholders touched by elder and disability law. NAELA has long supported strengthening both private and public infrastructure to ensure affordable access to health care and supportive services for all Americans, including those who are underserved. These proposed changes will allow this aspect of the public infrastructure to be more accessible to older adults who might not otherwise be aware of this assistance.

Second, the proposed rule seeks to ensure that legal assistance providers selected are qualified to assist clients in the “defense against guardianship.” Such term is defined as “advice to and representation of proposed protected persons and protected persons 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 seek limitation of guardianship and to seek revocation of guardianship.” We appreciate that ACL is taking an expansive view of this term and ask that the final rule specifically confirm that the defense against guardianship encompasses the provision of estate planning services that give the individual the ability to choose alternatives to guardianship.

Pursuant to Section 307(a)(11)(E) of the Older Americans Act which directs that ‘‘area agencies on aging will give priority to legal assistance related to ... defense of guardianship,” the rule further clarifies that legal assistance providers should represent older adults who may be subjected to guardianship to protect their rights and support their decision-making. The use of legal assistance funds for petitioning for guardianship of older adults would be prohibited except in the rare instance where the older adult seeks to become a guardian, when no other alternatives to guardianship are appropriate, and only if other adequate representation is unavailable in the proceedings. We ask that the final rule clarify whether this exception might include representing the older adult who seeks guardianship for a minor grandchild or other relative, as this circumstance might be the most common (though still rare) instance in which OAA-funded legal assistance provider might represent an individual for a guardianship petition.

NAELA believes guardianship should be a last resort; less restrictive alternatives such as appropriate durable powers of attorney, advance directives, trusts, representative payment arrangements, and other legal and social mechanisms should be explored and exhausted prior to judicial intervention. Moreover, we also support the proposed rule’s interpretation that the scope of Section 307(a)(11)(E) includes “representation to seek revocation of or limitations of a guardianship,” as restoration of an individual’s rights is another manner by which legal

assistance providers should give priority to the defense of guardianship. NAELA members can attest that a durable powers of attorney, for example, is an important tool for older adults to manage their property and finances. NAELA recognizes that durable powers of attorney depend upon fiduciaries performing their duties in the best interests of their principals. NAELA also supports appropriate efforts to prevent and combat improper uses of durable powers of attorney, other guardianship alternatives, or guardianship itself, as tools to financially exploit older adults and their caregivers. NAELA agrees with the proposed rule's preamble that a legal assistance program that would bring guardianship proceedings as part of its normal course of business, that represents a relative of an older person as petitioner at the request of a hospital or nursing facility to seek the appointment of a guardian to make health care decisions, or that undertakes representation at the behest of adult protective services would not satisfy the policy goals of the OAA. To this end, we seek clarification in the final rule about whether the legal assistance provider is limited to representing petitioners in guardian of the person cases only. In some jurisdictions such as Illinois, a guardian of the estate must continue to be represented by counsel throughout the entire guardianship in order to be bonded. Guardians of the person can petition pro se.

At the same time, NAELA respectfully notes the proposed rule fails to reconcile important nuances and complexities facing attorneys representing individuals with increasingly diminished decisionmaking capacity. Depending on the applicable laws of the jurisdiction including its case law, an attorney who has been defending their client against guardianship might, in one jurisdiction, be obligated to continue advocacy against guardianship even as circumstances with the client change (e.g., the client is no longer competent according to prevailing medical standards), whereas an attorney in another jurisdiction might advocate for the client unless the decision poses unreasonable risks to the client's health, safety, and welfare, in which case the attorney would inform a court of the potential need to appoint a guardian ad litem to represent the client's best interests in lieu of the attorney. For example, New Jersey recognizes the attorney's role does not extend to advocating decisions that are "patently absurd or pose an undue risk of harm."[1] We suggest that the final rule clarify that the legal assistance provider must adhere to applicable professional conduct rules and laws (including case law) in the relevant jurisdiction throughout the representation, as proposed under Section 1321.93(b)(1)(vi). In so doing, services related to "defense of guardianship" should adequately account for by the applicable laws and regulations to which the attorney is bound. We ask that ACL clarify the interaction between an attorney's professional obligations and the underlying policy goals of the OAA regarding giving priority to defense of guardianship. We further ask that ACL clarify how conflicts of interest should be addressed in cases when OAA or other government-funded services, such as Legal Services Corporation, may be funding both the prosecutor and defender in a guardianship case.

Lastly, the proposed regulation requires legal assistance providers to provide a broad range of legal assistance, including administrative and judicial representation, including in appellate forums. The rule clarifies a provider that focuses on only one area—especially an area which is not specified in the Act, such as drafting wills—does not meet the required qualifications. The

[1] *Matter of M.R.* 135 N.J. 155, 638 A.2d 1274 (April 7, 1994).

proposed rule further requires adherence to professional conduct rules for both attorney and non-attorney staff in legal assistance programs. NAELA supports these clarifications and emphasizes the important balance needed to maximize the available resources of area agencies on aging and legal assistance providers with the importance of delivering quality legal services for older adults including those of greatest economic or social need.

While NAELA supports all efforts to ensure beneficiaries of OAA services receive the maximum support in maintaining and strengthening their autonomy and independence, and that any legal services should be practiced according to laws governing the practice of law in the jurisdiction, we hope these regulations do not lead to a separation of legal services from AAA coordination, nor undermine efforts by AAAs to serve older adults and their caregivers – especially those in rural areas, for example. For example, if a rural client were in need of a particular service that an AAA can facilitate through a less comprehensive provider, NAELA requests that the final rule allow the AAA to facilitate such service, provided its actions are documented, accountable, and demonstrate the best efforts of the agency to provide the most comprehensive legal service. The proposed rule notes that "existing statutory and regulatory provisions urge legal assistance providers that are not housed within Legal Services Corporation grantee entities to coordinate their services with existing Legal Services Corporation projects. Such coordination will help ensure that services under the Act are provided to older adults with the greatest economic need or greatest social need and are targeted to the specific legal problems such older adults encounter." The final rule should not create legal services excessively independent of the AAA, nor should it prevent constituents from being served as best they can by the AAA. To that end, NAELA emphasizes the importance of providing technical assistance on coordination expectations as the proposed rule suggests.

Services to Family Caregivers

Pursuant to the OAA's 2000 reauthorization and in accordance with Title III, Part E of the Older Americans Act, the NPRM proposes to make several changes to ensure that OAA grant programs meet the needs of both individuals and their family caregivers. These revisions include acknowledging family caregivers as a service population. Specifically, NAELA supports the proposed text in: (1) Section 1321.71 that would expressly include the National Family Caregiver Support Program and family caregivers as a recognized service population; (2) Section 1321.75 to extend the confidentiality protections for sensitive information collected from family caregivers during interactions with State agencies and area agencies on aging (AAAs); and (3) Section 1321.91 that would further facilitate the provision of family caregiver support services by specifying the types of services that must be available Statewide, including individual information or assistance, case management or care coordination, individual counseling, caregiver trainings, and the organization of support groups for caregivers.

As we have noted in our prior comments to the National Caregiver Strategy, we have long advocated for policies that provide all relevant stakeholders (including family caregivers) have access to high-quality education and resources necessary for making important and difficult decisions about their or their loved ones' future. As such, we believe the proposed changes will further the overall goals of the National Caregiver Strategy and should be finalized.

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Conclusion

We thank ACL again for its commitment to policies that strive to ensure all people, regardless of age or disability, are able to live independently and participate fully in their communities. We thank ACL for its thoughtful consideration of the important issues discussed in the NPRM. We appreciate this and future opportunities to work with you. If you have any questions or would like to set up a discussion, please reach out to Michael Knaapen, NAELA's Director of Public Policy and Alliance Development, at MKnaapen@naela.org.

Sincerely,

Bridget O'Brien Swartz, Esq.
President
National Academy of Elder Law Attorneys