



August 18, 2013

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Administration for Community Living
Administration on Aging
US Department of Health and Human Services
Attention: Becky Kurtz
1 Massachusetts Avenue NW, 5th Floor
Washington, DC 20001

**RE: Administration on Aging (AoA) Proposed Rule Change for
State Long-Term Care Ombudsman Program proposed
06/18/2013. 45 CFR Parts 1321 and 1327.**

Voices for Quality Care (LTC), Inc., (Voices) a regional non-profit, all-volunteer organization of people who need long-term care services and supports, their friends and families, resident and family councils, advocates, and concerned citizens working together for quality long-term care, submits these comments on the proposed rule change to the State Long-Term Care Ombudsman Program . Voices is involved in systemic as well as individual advocacy. In our system advocacy efforts, Voices was instrumental in bringing about significant improvements in the Maryland State Ombudsman Program. We have also been in contact with and have worked closely with Ombudsmen in other states in efforts to improve Ombudsman services there. In our individual advocacy work, we are keenly aware of the importance of efficient and effective ombudsman programs in the lives of people who must live in our nursing homes and assisted living facilities as well as those receiving in-home and community-based care and services.

Certain Ombudsman Programs throughout the country have been seriously lax in fulfilling the full mission given to them in the Older Adults Act. We are heartened to see that the Administration on Aging is now working not only to improve these programs but also to give them a firm foundation to work from and a basis for enforcing those requirements. We feel that the new proposed Ombudsman Rule is a major step in the right direction. We wish to share with you our thoughts on language that we feel might enhance the effectiveness of this proposed rule.

Comments on the proposed new Ombudsman Program Rule:

PART 1321—GRANTS TO STATE AND COMMUNITY PROGRAMS ON AGING

- 1. The authority citation for Part 1321 continues to read as follows:

Authority: 42 U.S.C. 3001 *et seq.*; title III of the Older Americans Act, as amended.

- 2. Section 1321.11 is amended by revising paragraph (b) to read as follows:

§ 1321.11 State agency policies.

OUR OVERVIEW:

The autonomy and independence of the Ombudsman Programs must be clear throughout these regulations.

The Ombudsman Programs must be structured as top-down programs with the State Ombudsman and only the State Ombudsman directing all aspects of the program and responsible for its integrity, efficiency, and effectiveness.

The Ombudsman Programs must fulfill the requirements of every part of the federal law serving solely as advocates for the people who need long-term care services and supports.

Considering our struggles with troubled Ombudsman Programs in MD, IA, CA, KS, FL, NJ, NY and other unnamed states, we cannot overemphasize the need for these regulations to firmly state the importance of ombudsman autonomy and independence in relation to both systems advocacy and individual advocacy.

State Agency Policies

The Older Americans Act mandates that the State Agency establish "policies and procedures for monitoring local ombudsman entities." The regulations should require the State Agency to develop a plan on how the Office of the State Long-Term Care Ombudsman is immunized from potential conflict or interference, thereby ensuring its autonomous advocacy on behalf of residents.

Establishment of the Office of the State Long-Term Care Ombudsman

Specific Suggestions:

CURRENT:

(b) The policies developed by the State agency shall address the manner in which the State agency will monitor the performance of all programs and activities initiated under this part for quality and effectiveness. The State Long-Term Care Ombudsman or his or her designee shall be responsible for monitoring the files, records, and other information maintained by the Office, and shall not disclose the identity of any complainant or Long-Term care facility resident to individuals outside of the Office, except as otherwise...

SUGGEST:

(b) The policies developed by the State agency shall address the manner in which the State agency will monitor under this part for quality and effectiveness the activities initiated and performance of all programs, **and the state agency and the AOA shall ensure no conflicts of interest arise or persist.** The State Long-Term Care Ombudsman or his or her designee shall be responsible for monitoring the files, records and other information maintained by the Office,

and shall not disclose the identity of any complainant or **STRIKE Long-Term care facility resident ADD person needing long-term supports and services** to individuals outside of the Office, except as otherwise...

WE ALSO SUGGEST:

Adding a reasonable provision encouraging Ombudsmen to share non-confidential information with non-profit Long-Term Care Advocacy Organizations and confidential information in specific cases with written permission from the complainant.

Voices for Quality Care and other Long-Term Care Advocacy Organizations have had considerable difficulty in some areas of the country even getting local and state ombudsmen to talk to us, much less to collaborate in cases where we not only have written permission from a person living in a nursing home or assisted living facility or their legal representative but are also the first contact. Our goal in such cases is to establish communication between the complainant and the local ombudsman. In these cases, it is we who are referring people to the local or state ombudsmen, we who are providing the information to the local or state ombudsman to apprise them of our actions or positions, and to coordinate those with the ombudsman program so that we work in tandem and not at cross purposes. Yet we are often unable to establish any kind of communication with the ombudsman program.

§ 1327.13 Functions and responsibilities of the State Long-Term Care Ombudsman

OUR OVERVIEW:

F. Functions and Responsibilities

Ombudsman Responsibility with Respect to Designation and De-designation of Representatives

We agree with this recommendation, but welcome some additional clarification. Protections are needed to ensure justice in situations where a State Ombudsman terminates a local ombudsman whose actions were in compliance with federal law. We've seen too many of these incidences which also often involve conflicts of interest on the part of the State Ombudsman. We've lost a number of very effective local ombudsmen in this way.

State Agency Responsibility with Respect to Non-Interference

A mechanism must be developed and implemented that provides protection for ombudsmen when State agency personnel, legislators, or industry representatives attempt to curtail their legally required advocacy efforts.

Specific Suggestions:

CURRENT:

(8)(ii) Promote the development of citizen organizations, to participate in the program; and

SUGGEST:

(8)(ii) Promote the development of citizen organizations. **STRIKE to participate in the program; and**

The phrase "to participate in the program" is often interpreted as developing and working with only citizen organizations willing to work under the direct control of the Ombudsman Program. This tends to chill cooperation between advocacy groups and the ombudsman programs.

CURRENT:

(8)(iii) Provide technical support for the development of resident and family councils to protect the well-being and rights of residents; and carry out such other activities as the Assistant Secretary determines to be appropriate.

SUGGEST:

(8)(iii) Provide **technical** support **and guidance** for **the development of** resident and family councils to protect the well-being and rights of residents **and to ensure their ability to exercise the rights given to them in federal law**

Both Resident and Family Councils are fragile entities. Resident Councils are often simply activities within a nursing home. All residents are wheeled in regardless of whether they are aware of what is happening and are able to participate or not. Votes are taken in a happy-happy manner with staff eagerly waiving their hands. The audience responds accordingly and the vote is recorded in the manner the staff prefers regardless of the opinions of those residents who are actually aware of what is taking place. Minutes are then filed with no action taken. This was not the intent of the law.

Family Councils often need the assistance and guidance of the local ombudsman for more than the formation of the Council. We too often see instances of Ombudsmen, upon being requested to assist an individual in the formation of a Family Council, simply handing that individual a sheaf of written instructions and little more. Family Councils not only need the support and guidance of Ombudsmen during the formation period but also when dealing with recalcitrant administrators as the organizations move forward.

THANK YOU FOR:

(8)(b) The Ombudsman shall oversee a unified statewide program in which representatives of the Office report to the Ombudsman regarding Ombudsman program functions and duties as set forth in §§ 1327.13(a) and 1327.17(a).

(8)(c) The Ombudsman shall determine designation and de-designation of local Ombudsman entities and representatives of the Office pursuant to section 712(a)(5) of the Act.

These two sections are very important to those of us who seriously need effective, efficient, and consistent Ombudsman Services throughout the country. Thanks for including them.

CURRENT:

(8)(d) Where local Ombudsman entities are designated, the Ombudsman shall review and approve plans or contracts related to Ombudsman program operations, including, where applicable, through area agency on aging plans (in coordination with the State agency).

SUGGEST:

(8)(d) Where local Ombudsman entities are designated, the Ombudsman shall review and approve plans or contracts related to Ombudsman program operations, including, where applicable, through area agency on aging plans **(in coordination with the State agency). Suggest fixing this language to make it clear that it is the Agency that must coordinate with the State Ombudsman rather than the other way around.**

§ 1327.15 State agency responsibilities related to the Ombudsman program.

CURRENT:

(5) Prohibit any representative of the Office (other than the Ombudsman) from carrying out any activity described in § 1327.13(a)(1) through (8) unless the representative—

(i) Has received the training required under paragraph (c)(4) of this section; and

(ii) Has been approved by the Ombudsman as qualified to carry out the activity on behalf of the Office;

SUGGEST:

ADD: (iii) And is a certified ombudsman

§ 1327.17 Functions and duties of the Office of the State Long-Term Care Ombudsman

CURRENT:

(4) Represent the interests of residents before government agencies and seek administrative, legal, and other remedies to protect the health, safety, welfare, and rights of the residents;

SUGGEST:

This is an area of concern in many states. It is often overlooked or deliberately disregarded. This responsibility needs to be emphasized and stringently enforced.

CURRENT:

(6) Support the development of resident and family councils; and

SUGGEST:

(6) Support the development **and continuation** of resident and family councils; and

§ 1327.19 Conflicts of interest.

I. Conflicts of Interest

Capturing information through NORS regarding organizational conflicts is a good first step. The proposed regulations still seem to lack the development of necessary firewalls to protect the program and its personnel from interference, intimidation, or retaliation by State officials. If the remedy is to "educate" States who fail to remove conflicts, then we fear it will continue to be open season on Ombudsman Programs.

Specific Suggestions:

CURRENT:

The State agency shall consider both the organizational and individual conflicts that may impact the effectiveness and credibility of the work of the Office. In so doing, it shall identify actual and potential conflicts and, where a conflict has been identified, shall remove or remedy such conflict as set forth in paragraphs (b) and (d) of this section.

SUGGEST:

The State agency **and AOA** shall consider both the organizational and individual conflicts that may impact the effectiveness and credibility of the work of the Office. In so doing, it shall identify actual and potential conflicts and, where a conflict has been identified, shall remove or remedy such conflict as set forth in paragraphs (b) and (d) of this section.

As a result of our experiences in working with the Offices of the State Ombudsman in various states and under various circumstances, we strongly feel that unless AOA monitors and reinforces the State agencies in this regard compliance cannot be assured.

CURRENT:

(7) The State agency shall ensure that policies and procedures are in place so that, in designating representatives of the Office, the Ombudsman shall:

SUGGEST:

(7) The State agency **and AOA** shall ensure that policies and procedures are in place so that, in designating representatives of the Office, the Ombudsman shall:

Again, as a result of our experiences in working with the Offices of the State Ombudsman in a number of states, we strongly feel that unless AOA monitors and reinforces the State agencies in this regard compliance cannot reasonably be expected.

CURRENT:

(5)(iii) Has been employed by, or participating in the management of, a Long-Term care facility within the previous year; or

SUGGEST:

(5)(iii) Has been employed by, or participating in the management of, a Long-Term care facility within the **past 2 years**; or

Given the health of the revolving door within the Long-Term Care Community, at least a 2-year break will be necessary in order to prevent the appearance or the actual occurrence of conflicts of interest.

OTHER COMMENTS:

The Long-Term Care Ombudsman Programs are public programs and as such must be open and transparent so far as the policies, procedures, and operations of the program on both the State and Local levels. The Confidentiality mandate should clearly apply only to the interaction between Ombudsman and Client and should in no way be used as a cloak to obscure deficiencies within the program.

Voices has encountered several State Ombudsmen who have given us reason to suspect close ties to people working in the Long-Term care industry. These individuals have made decisions that have benefited providers over the people they are supposed to be advocating for. This undermines confidence in the entire Program