

OAA Final Regulations – 45 CFR § 1324

The final rule was published in the [Federal Register](#) on February 14, 2024, with a compliance date of October 1, 2025. Only sections with changes are included in this document. New language is underlined and removed language is ~~struck out~~.

Subpart A—State Long-Term Care Ombudsman Program

§ 1324.1 Definitions.

New definition - *Official duties*, with respect to representatives of the LTCOP, means work pursuant to the LTCOP authorized by the Act, and/or State law and carried out under the auspices and general direction of, or by direct delegation from, the SLTCO.

Clarifies - *Resident representative* that an individual chosen by the resident to act on their behalf in order to support them in decision-making has access to the resident's medical, social or other personal information, manage the resident's financial matters, or receive notifications pertaining to the resident.

§ 1324.11 Establishment of the Office of the State Long-Term Care Ombudsman

(e) Clarifies that where State law does not provide the Ombudsman with legal authority to establish policies and procedures (P&Ps), the Ombudsman will recommend P&Ps to the State agency or other agency in which the Office is organizationally located, and that agency shall establish Ombudsman program P&Ps as recommended by the Ombudsman.

Also **clarifies** that where local Ombudsman entities are designated within area agencies on aging or other entities, the Ombudsman and/or appropriate agency shall develop P&Ps in consultation with the agencies hosting local Ombudsman entities, area agencies on aging, and representatives of the Office.

(1) Program administration.

(iii) Clarifies that the Ombudsman shall on a regular basis monitor the performance of local Ombudsman entities which have been designated to carry out the duties of the Office.

(v) Clarifies that P&P must include standards that ensure that the Office and/or local Ombudsman entities provide prompt response to complaints, with priority given to complaints regarding abuse, neglect, exploitation and complaints that are time sensitive. At a minimum, the standards shall require consideration of the severity of the risk to the resident, the imminence of threat or potential harm to the resident, and the opportunity for mitigating harm to the resident through provision of Ombudsman program services.

(vii) Adds that P&Ps must include procedures that establish standard retention periods for files, records, and other information maintained by the Ombudsman program and allowable methods of storage and destruction.

(2) Procedures for access. P&P must include:

(iv) (C) Adds - Access to review the medical, social and other records relating to a resident if the resident is unable to communicate consent to the review and has no legal representative, and the representative of the Office obtains the approval of the Ombudsman.

(3) Disclosure. P&P must include:

(iv) Adds – P&Ps must include standard criteria 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 consent.

(v) Clarifies – P&Ps must include a prohibition on requirements for mandatory reporting abuse, neglect, or exploitation to APS or any other entity, LTC facility, or other concerned person ...

(4) Conflicts of interest. P&Ps must include:

(i), (ii), (iii) – Clarifies that P&Ps must ensure an individual is not employed, appointed, designated as a representative of the Office if they, or a member of their immediate family has or may have a conflict of interest.

(8) Determinations of the Office.

Clarifies that P&Ps must ensure that the Ombudsman shall be able to independently made determination and establish positions of the Office, and carry out the functions and responsibilities of the Office without interference, and shall not be constrained by or necessarily represent the determinations or positions of the State agency or other agency in which the Office is located.

(9) Adds – Emergency Planning – P&Ps related to emergency planning must include continuity of operations procedures using an all-hazards approach, and coordination with emergency management agencies.

§ 1324.13 Functions and responsibilities of the State Long-Term Care Ombudsman.

Clarifies that the Ombudsman, as head of the Office, has responsibility and authority for the leadership and management of the Office in coordination with the State agency and any other agency carrying out the Ombudsman program.

(b) Now called - **Responsibilities**. Rest of language is unchanged.

(c) **Designation.**

(1) **Clarifies** – If an Ombudsman chooses to delegate (changed from “Where” an Ombudsman chooses to delegate)

(2) **Clarifies** that the Ombudsman shall establish P&Ps for training for certification and continuing education based on and consistent with standards established by the Director of LTCOPs.

(iii) Adds – Procedures for training for certification and continuing education shall specify that all program staff or volunteers who have access to residents, files, records, and other information of the Ombudsman program subject to disclosure requirements undergo training and certification to be designated as representatives of the Office.

(d) **Ombudsman program information. Clarifies** that all program staff or volunteers who access the files, records, and other information of the Ombudsman program subject to disclosure requirements shall undergo training and certification to be designated as representatives of the Office.

(e) **Disclosure.**

(3) **Clarifies** that the Ombudsman shall develop and adhere to criteria to guide the Ombudsman’s discretion in determining whether to disclose the files, records, or other information of the Office. Criteria for disclosure of records shall consider if the disclosure has the potential to:

(i) Cause retaliation against residents, complainants, or witnesses;

(ii) Undermine the working relationships between the Ombudsman program, facilities, and/or other agencies; or

(iii) Undermine other official duties of the program.

(g) **Annual report. Clarifies** that In addition to the annual submission of the National Ombudsman Reporting System report, the Ombudsman shall independently develop and provide final approval of and disseminate an annual report.

(h) **Now called - Memoranda of Understanding.**

(1) **Adds** – The required adoption of MOU between the Ombudsman program and:

(i) Legal assistance programs, addressing at a minimum referral processes and strategies to be used when the Ombudsman program and a legal assistance program are both providing services to a resident;

(ii) Facility and LTC provider licensure and certification programs, addressing at a minimum communication protocols and procedures to share information including procedures for access to copies of licensing and certification records maintained by the State with respect to LTC facilities.

(2) The recommended adoption of MOU or other means between the Ombudsman program and:

(i) Area agencies on aging programs

(ii) Aging and disability resource centers

(iii) Adult protective services programs

(iv) Protection and advocacy systems

~~(v) **Removed** facility and LTC provider licensure and certification programs~~

(v) State Medicaid fraud control unit

(vi) Victim assistance programs

(vii) State and local law enforcement agencies

(viii) Courts of competent jurisdiction

(ix) State legal assistance developer and legal assistance programs

(x) **Adds** – The State mental health authority

(i) **Now called Other activities** – **Clarifies** that the Ombudsman shall carry out such other activities as the Assistant Secretary for Aging determines to be appropriate and are consistent with the functions of the SLTCOP.

§ 1324.15 State agency responsibilities related to the Ombudsman program.

(a) **Now called Compliance.**

(b) **Now called Authority and access.**

(c) **Now called Training.**

(d) **Now called Personnel supervision and management**

(e) **Now called State agency monitoring**

(f) **Now called Disclosure limitations.**

(g) **Now called State and area plans on aging.**

(h) **Now called Elder rights leadership.**

(i) **Interference, retaliation and reprisals.**

(j) **Legal counsel.**

(1) Clarifies that the State agency shall ensure that:

(i) Legal counsel for the Ombudsman program is adequate, available and is without conflict of interest, in order to –

(A) The Program. In order to provide consultation and/or representation to assist the Ombudsman and representatives of the Office in the performance of their official functions, responsibilities, and duties, including complaint resolution and systems advocacy. Legal representation, arranged by or with the approval of the Ombudsman, is provided to the Ombudsman or any representative of the Office against whom suit or other legal action is brought or threatened to be brought in connection with the performance of official duties;

(B) Residents. In order to provide consultation and representation as needed for the Ombudsman program to protect the health, safety, welfare, and rights of residents.

(k) **Adds Fiscal management**. The State agency shall ensure that:

(1) The Ombudsman receives notification of all sources of funds received by the State agency that are allocated to or appropriated to the Ombudsman program and provides information on any requirements of the funds, and the Ombudsman is supported in their determination of the use of funds;

(2) The Ombudsman has full authority to determine the use of fiscal resources appropriated or otherwise available for the operation of the Office;

(3) Where local Ombudsman entities are designated, the Ombudsman approves the allocations of Federal and State funds to such entities, prior to any distribution of such funds, subject to applicable Federal and State laws and policies; and

(4) The Ombudsman determines that program budgets and expenditures of the Office and local Ombudsman entities are consistent with laws, policies, and procedures governing the Ombudsman program.

(l) **Now called State agency requirements of the Office.**

§ 1324.19 Duties of the Representatives of the Office.

(a) Duties

(7) **Clarifies** that representatives of the Office have a responsibility to Carry out other activities the Ombudsman determines to be appropriate and are consistent with the functions of the SLTCOP.

(b) Complaint processing

(5) **Clarifies** that if a resident is unable to communicate their informed consent or perspective, the Ombudsman or representative may rely on communication by a resident representative of informed consent and/or perspective regarding the resolution of a complaint if the Ombudsman or representative has no reasonable cause to believe that the resident representative is not acting in the best interests of the resident.

§ 1324.21 Conflicts of interest.

(a) Identification of organizational conflicts

(1) **Clarifies** that an organizational conflict of interest includes placement of the Office, or requiring that an Ombudsman or representative of the Office perform conflicting activities in an organization that is responsible for licensing, surveying, or certifying LTC services including facilities;

(6) **Adds** - that an organizational conflict of interest includes placement of the Office, or requiring that an Ombudsman or representative of the Office perform conflicting activities in an organization that Provides LTC services, including programs carried out under a Medicaid waiver or Medicaid State plan;

(7) **Clarifies** - that an organizational conflict of interest includes placement of the Office, or requiring that an Ombudsman or representative of the Office perform conflicting activities in an organization that Provides LTC coordination or case management, including for residents of LTC facilities

(9) **Adds** - that an organizational conflict of interest includes placement of the Office, or requiring that an Ombudsman or representative of the Office perform conflicting activities in an organization that Sets reimbursement rates for LTC services;

(11) **Adds** - that an organizational conflict of interest includes placement of the Office, or requiring that an Ombudsman or representative of the Office perform conflicting activities in an organization that Is responsible for eligibility determinations for the Medicaid program;

(13) **Clarifies** - that an organizational conflict of interest includes placement of the Office, or requiring that an Ombudsman or representative of the Office perform conflicting activities in an organization that Conducts preadmission screening for LTC facility admission; ...

(c) **Identifying individual conflicts of interest**

(2) Individual conflicts of interest for an Ombudsman, representatives of the Office, and members of their immediate family include, but are not limited to:

(i) **Clarifies** - Direct involvement in the licensing or certification of a LTC facility or of a provider of LTC service;

(ii) **Clarifies** - Ownership, operational, or investment interest (represented by equity, debt, or other financial relationship) in an existing or proposed LTC facility or of a provider of a LTC service;

(iii) **Clarifies** - Employment of an individual by, or participation in the management of, a LTC facility or a related organization in the service area or by the owner or operator of any LTC facility in the service area;

(ix) **Adds** - Management responsibility for, or operating under the supervision of, an individual with management responsibility for APS; and

(x) **Adds** - Serving as a guardian or in another fiduciary capacity for residents of LTC facilities in an official capacity (as opposed to serving in such a role in a personal capacity).

Added - Subpart B—Programs for Prevention of Elder Abuse, Neglect, and Exploitation

§ 1324.201 State agency responsibilities for the prevention of elder abuse, neglect, and exploitation

(a) In accordance with Title VII, chapter 3 of the Act, the distribution of Federal funds to the State agency on aging by formula is authorized to carry out activities to develop, strengthen, and carry out programs for the prevention, detection, assessment, and treatment of, intervention in, investigation of, and response to elder abuse, neglect, and exploitation.

- (b) All programs using these funds must meet requirements as set forth in the Act, including those of section 721(c), (d), (e) (42 U.S.C. 3058i(c)-(e)) and guidance as set forth by the Assistant Secretary for Aging.

Added - Subpart C—State Legal Assistance Development

§ 1324.301 Definitions.

- (a) Definitions as set forth in § 1321.3 of this chapter apply to this part.
- (b) Terms used, but not otherwise defined in this part will have the meanings ascribed to them in the Act.

§ 1324.303 Legal Assistance Developer.

- (a) State Legal Assistance Developer. In accordance with section 731 of the Act (42 U.S.C. 3058j), the State agency shall designate an individual who shall be known as a State Legal Assistance Developer, and other personnel, sufficient to ensure:
 - (1) State leadership in securing and maintaining the legal rights of older individuals;
 - (2) State capacity for coordinating the provision of legal assistance, in accordance with section 102(23) and (24) and consistent with section 102(33) of the Act (42 U.S.C. 3002(23), (24), (33)), to include prioritizing such services provided to individuals with greatest economic need, or greatest social need;
 - (3) State capacity to provide technical assistance, training, and other supportive functions to area agencies on aging, legal assistance providers, Long-Term Care Ombudsman programs, adult protective services, and other service providers under the Act;
 - (i) The Legal Assistance Developer shall utilize the trainings, case consultations, and technical assistance provided by the support and technical assistance entity established pursuant to section 420(c) of the Act (42 U.S.C. 3032i(c)).
 - (ii) [Reserved]
 - (4) State capacity to promote financial management services to older individuals at risk of guardianship, conservatorship, or other fiduciary proceedings;
 - (i) In so doing, the Legal Assistance Developer shall take into consideration promotion of activities to increase awareness of and access to self-directed financial management services and legal assistance and;

- (ii) The Legal Assistance Developer shall also take into consideration promotion of activities that proactively enable older adults and those they designate as decisional supporters through powers of attorney, health care proxies, supported decision making and similar instruments or approaches to be connected to resources and education to manage their finances and the decisions they make about their lives so as to limit their risk for guardianship, conservatorship, or more restrictive fiduciary proceedings.
- (5) State capacity to assist older individuals in understanding their rights, exercising choices, benefiting from services and opportunities authorized by law, and maintaining the rights of older individuals at risk of guardianship, conservatorship, or other fiduciary proceedings;
 - (i) In so doing, the Legal Assistance Developer shall take into consideration engaging in activities aimed at preserving an individual's rights or autonomy, including, but not limited to, increasing awareness of and access to least-restrictive alternatives to guardianship, conservatorship, or more restrictive fiduciary proceedings, such as supported decision making, and legal assistance;
 - (ii) In so doing, the Legal Assistance Developer shall adhere to the restrictions contained in section 321(a)(6)(B)(i) of the Act (42 U.S.C. 3030d(a)(6)(B)(i)) regarding the involvement of legal assistance providers in guardianship proceedings, and shall apply these restrictions to conservatorship and other fiduciary proceedings;
 - (iii) In undertaking this activity, the Legal Assistance Developer shall take into consideration coordination of efforts with legal assistance providers funded under the Act contracted by area agencies on aging, any Bar Association Elder Law section, and other elder rights or entities active in the State.
- (6) State capacity to improve the quality and quantity of legal services provided to older individuals.
- (b) **State plan.** The activities designated by the State agency for the Legal Assistance Developer, in accordance with paragraphs (a)(1) through (6) of this section, shall be contained in the State plan, per section 307 of the Act (42 U.S.C. 3027) and as set forth in § 1321.27 of this chapter.
- (c) **Knowledge, resources, and capacity.** The State agency shall ensure that the Legal Assistance Developer has the knowledge, resources, and capacity to conduct the activities outlined in paragraph (a) of this section.
- (d) **Conflicts of interest.**

- (1) In designating a Legal Assistance Developer, the State agency shall consider any potential conflicts of interest posed by any candidate for the role, and take steps to prevent, remedy, or remove such conflicts of interest.
- (2) In designating a Legal Assistance Developer, the State agency shall consider both organizational and individual interests that may impact the effectiveness and credibility of the work of the Legal Assistance Developer to coordinate legal assistance and work to secure, protect, and promote the legal rights of older adults in the State.
 - (i) This includes holding a position or performing duties that could lead to decisions that are or have the appearance of being contrary to the Legal Assistance Developer's duties as defined in this section and contained in the State plan as set forth in § 1321.27 of this chapter.
 - (ii) [Reserved]
- (3) The State agency shall not designate as Legal Assistance Developer any individual who is:
 - (i) Serving as a director of adult protective services, or as legal counsel to adult protective services;
 - (ii) Serving as a State Long-Term Care Ombudsman, or as legal counsel to a State Long-Term Care Ombudsman Program;
 - (iii) Serving as a hearing officer, administrative law judge, trier of fact or counsel to these positions in an administrative proceeding related to the legal rights of older adults, such as one in which a legal assistance provider might appear;
 - (iv) Serving as legal counsel or a party to an administrative proceeding related to long-term care settings, including residential settings;
 - (v) Conducting surveys of and licensure certifications for long-term care settings, including residential settings, or serving as counsel or advisor to such positions;
 - (vi) Serving as a public or private guardian, conservator, or fiduciary or operating such a program, or serving as counsel to these positions or programs.
- (4) The State agency and the Legal Assistance Developer shall be responsible for identifying any other actual and potential conflicts of interest and circumstances that may lead to the appearance of a conflict of interest; identifying processes for preventing conflicts of interest and, where a conflict of interest has been identified, for removing or remedying the conflict.

- (5) The State agency shall develop and implement policies and procedures to ensure that the Legal Assistance Developer is not required or permitted to hold positions or perform duties that would constitute a conflict of interest.



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This project was supported by the Administration for Community Living (ACL), U.S. Department of Health and Human Services (HHS) as part of a financial assistance award totaling \$516,407 with 100 percent funding by ACL/HHS. The contents are those of the author(s) and do not necessarily represent the official views of, nor an endorsement, by ACL/HHS or the U.S. Government.