August 19, 2013

Administration for Community Living
Administration on Aging
US Department of Health and Human Services
Attention Becky Kurtz
Washington, DC 20201

Submitted electronically

RE: Comments on the Administration on Aging’s Proposed Rule on the State Long-Term Care Ombudsman Program published in the June 18, 2013 Federal Register (45 CFR parts 1321 and 1327)

Dear Ms. Kurtz:

On behalf of CARIE, thank you for the opportunity to provide comments regarding the Administration on Aging’s (AoA’s) proposed rule for the State Long-Term Care Ombudsman Program (Ombudsman Program). Overall, we are supportive of the proposed regulations and believe this is a positive step that will benefit many consumers. Founded in 1977, CARIE, the Center for Advocacy for the Rights and Interests of the Elderly, is a non-profit advocacy organization working to improve the well-being, rights and autonomy of older adults. CARIE routinely helps older adults and their caregivers understand and resolve problems related to long term services and supports. In addition, CARIE currently serves as the local ombudsman for certain areas of Philadelphia including 29 nursing homes, 37 personal care homes, 88 domiciliary care homes, and 18 older adult daily living centers. Through our work, we are aware of the issues and challenges ombudsmen face as well as the needs and struggles of consumers of long term care.

CARIE is pleased that AoA is promulgating regulations for the Ombudsman Program. The regulations will provide much needed clarity and uniformity among state programs. We are particularly pleased to see a strong value placed on the independence of the Ombudsman Program bringing needed guidance on conflict of interest issues both real and perceived. The emphasis on confidentiality is also essential to maintain the success and credibility of the program. We hope the new regulations will bring a new era of stringent federal enforcement of the new regulations. CARIE offers the following comments and recommendations to help strengthen the proposed rule.

§1321.11 State agency policies

CARIE believes that aggregate data is sufficient to monitor the duties of the Ombudsman Program and at no time should an Ombudsman Program disclose the identity of a resident. Files, records and other information should be the property of the Ombudsman Office, which includes the representatives of the State Ombudsman Office.

* Deceased
§1327.1 Definitions

CARIE recommends adding a definition for “willful interference” to help ensure states comply with section 712 of the Older Americans Act and that representatives of the Ombudsman Program remain free of interference. The proposed rule uses the terms “legal representative” and “resident representative” throughout. Remove resident representative completely because it is confusing and ambiguous. The proposed rule uses the term “unable to communicate informed consent.” This term is ambiguous and should be clearly defined.

§1327.11 Establishment of the Office of the State Long-Term Care Ombudsman

CARIE supports the language that clearly defines the Office as an independent entity. There are too many opportunities for conflicts of interest when the Ombudsman Office is located within a State agency. The Office of the Long Term Care Ombudsman Program should be a distinct and separate entity and must not be located within or connected to a State agency to ensure the State Ombudsman and ombudsman representatives have the autonomy to make appropriate determinations regarding issues impacting consumers of long term services and supports in accordance with the Older Americans Act. It is not realistic to think that a State Ombudsman who is employed by a State agency can make recommendations in conflict with the State Agency or with the Governor. In addition, it is difficult to imagine what a State Ombudsman faces in advocating for consumers with a peer at a regulatory agency. Similarly, the local ombudsman located within the local Area Agency on Aging (or even contracted by the local AAA) faces conflicts with the local AAA in making recommendations or when investigating problems at county based facilities. Again, when another worker in the agency serves as guardian, protective service worker, care manager, assessment worker or placement worker, it is not difficult to imagine the challenges in maintaining the independence and advocacy necessary to protect the rights of vulnerable older adults. CARIE recommends adding language to protect the Ombudsman program and representatives of any potential retaliatory action when exercising independence.

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

Again, we are pleased to see the emphasis on the independence of the Ombudsman Office in this section. However, additional protections should be added that allow state and local ombudsman due process through a third party formal appeals process if threatened with de-designation.

§1327.15 State agency responsibilities related to the Ombudsman program

Since the ombudsman in every jurisdiction is not responsible for investigating abuse and cannot make a determination regarding substantiating abuse when abuse is suspected, reporting suspected abuse can create problems and potentially weaken the core client advocate role of the ombudsman. The term “unable to communicate informed consent” is also problematic in determining when the ombudsman discloses the identity of a resident if the ombudsman suspects abuse. Proposing situations when ombudsman needs to be a mandatory reporter runs counter to the intent of the Older Americans Act and the ombudsman’s unique role as a resident advocate. As resident advocates, it is paramount that ombudsman obtain permission from residents prior to identifying them. In Pennsylvania, the only time an ombudsman should disclose the identity of a resident is when the ombudsman has witnessed the abuse BUT the ombudsman should still include the resident in decision making. The ombudsman should attempt to obtain permission from the resident and if not successful, the ombudsman should let the resident know that the ombudsman will need to report what was witnessed. CARIE recommends that regardless of the person’s capacity (or whether they have a legal representative and/or guardian), the ombudsman should always attempt to obtain consent from the resident, however, not be prohibited from moving forward without that consent if it is warranted.
§1327.17 Functions and duties of the Office of the State Long-Term Care Ombudsman

The independence of the Ombudsman Program is paramount to allow ombudsman to effectively advocate on both an individual and systemic level. Political intrusion both hidden and overt interferes with an ombudsman’s ability to be an effective advocate. There are numerous instances when ombudsman are stymied in their advocacy role. One example of this problem is the firing of the state ombudsman in Florida when he expressed views that were not supported by the state. AoA should consider adding language that requires a civil monetary penalty if any entity interferes with the duties of the state and/or local ombudsman.

§1327.19 Conflicts of interest

CARIE supports the language in the rule to help ensure the independence of the Office and conflict of interest policies. The only way to maintain a conflict free program is to be sure the Office is not located within or connected to the State Agency and is completely independent from the State Agency. The proposed rule should explicitly state this.

All state and local ombudsman programs should be required to report any perceived and real conflicts of interest directly to a neutral third party. There is a need to add stronger language to protect ombudsman from retaliation. This continues to occur in spite of prohibitions under the Older Americans Act.

The examples provided in the proposed rule in §1327.19(a) are comprehensive and should be strictly enforced. It may be important to know that in Pennsylvania and likely other states, the AAA is the designated ombudsman for the county while many of the counties own, operate and/or manage a county nursing home with both agencies under the same leadership.

It is important to mention that even subcontracted agencies deal with a loss in autonomy. It is important that the ombudsman have the ability to act on behalf of residents freely. For example, it would be helpful if all local ombudsman programs had their own signage, stationary, business cards, and outreach materials independent from the AAA. This would help in reducing confusion and the perceived conflict of interest with an AAA. CARIE’s ombudsman have been questioned by residents on numerous occasions as to why they were wearing a nametag that has the local AAA on it.

The language used for removing or remedying individual conflicts seems stronger than the language for organizational conflicts. We recommend using the same language for both. The State Agency should not be ultimately responsible for identifying, removing or remedying a conflict of interest. It should be a neutral third party with no stake in the ombudsman program.

The Older Americans Act requires the Ombudsman Program to have access to legal counsel. The proposed rule does not go far enough to ensure that the state or local ombudsman have access to legal counsel. The legal counsel should not be part of a state agency or have a conflict of interest with the program. The need for independent legal counsel arises with guardian cases also. There are examples where the same legal counsel was responsible for the guardianship process and serving as the ombudsman program’s legal counsel, which is in direct conflict of the ombudsman consumer advocacy role.

The data that is collected through NORS is accurate and appropriate. Under the Affordable Care Act, Ombudsman Programs were granted access to information about facility owners and operators. This information will be helpful with identifying potential conflict of interest issues as well as helping identify who is ultimately responsible at a facility. It would be helpful if there were guidance on how Ombudsman Programs could access this data, especially since there are so many large corporations that own and manage facilities across state lines. It would also be helpful if the NORS data collected the number of people residing in facilities in addition to the number of beds in facilities.
Home and Community-Based Services

As the country continues to shift to providing more home and community-based services and some Ombudsman Programs are already providing services to consumers receiving home and community-based services, CARIE believes the rule should provide guidance that reflects best practices and coordination with more traditional ombudsman services.

Thank you again for the opportunity to share our comments and recommendations. We hope AoA will strengthen and finalize the proposed regulations related to the ombudsman program. If you have any questions, please feel free to contact me directly at menio@carie.org or 267-546-3434.

Sincerely,

Diane A. Menio
Executive Director