



NEW MEXICO POLICIES & PROCEDURES

SECTION CONTENTS

LEGAL ASSISTANCE SERVICES

THE DOCUMENT CONTAINED HEREIN IS SUBJECT TO CHANGE.

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NEW MEXICO FISCAL STATE UNIT ON AGING (SUA)
POLICIES AND PROCEDURES
Updated for 45 C.F.R. §1321.93

LEGAL ASSISTANCE SERVICES

1.0 PURPOSE

- A. The purpose of this policy is to establish the Aging and Long-Term Services Department's (ALTSD) Legal Assistance Services Policies and Procedures (Required for SUA, AAAs, and Providers) by 45 C.F.R. §1321.93.
- B. If any provision of this policy conflicts with a provision of an applicable Collective Bargaining Agreement (CBA), the CBA shall control.

1. REFERENCES

- A. Authority: 45 C.F.R. §1321.93

2. DEFINITIONS

- A. "Defense of Guardianship" in this section means advice to and representation of older individuals at risk of and subject to guardianship as defined in 45 C.F.R. Section 1321.93(d) and includes:
 - 1. Representation to maintain the rights of individuals at risk of guardianship, and to advocate for limited guardianship if a court orders guardianship to be imposed; assistance removing or limiting an existing guardianship; or assistance to preserve or restore an individual's rights or autonomy; and
 - 2. Representation to advocate for and assert use of least-restrictive alternatives to guardianship to preserve or restore an individual's rights and or autonomy to support decision-making, or to limit the scope of guardianship orders when such orders have or will be entered by a court.
- B. A "fee generating case" includes any matter which, if undertaken by a private legal practitioner on behalf of a client, could reasonably be expected to result in an awarded legal fee directly payable out of the amount awarded the client from the opposing parties, or from public funds.
- C. "Greatest economic need" means the need for legal assistance resulting from income at or below the Federal poverty level, as defined in section 102(44) of the Act ([42 U.S.C. 3002\(44\)](#)), that is insufficient to meet the legal needs of an older individual or that causes barriers to attaining legal assistance to assert the rights of older individuals as articulated in the Act and in the laws, regulations, and Constitution.
- D. "Greatest social need" means the need for legal assistance resulting from social factors, as defined by in section 102(24) of the Act ([42 U.S.C. 3002\(24\)](#)), that cause barriers to attaining legal assistance to assert the rights of older individuals.
- E. "Legal assistance" means legal advice and representation provided by an attorney to older individuals with economic or social needs; and may include, to the extent feasible, counseling or other appropriate assistance provided by a paralegal or law student under the direct supervision of a licensed attorney and counseling and representation provided by a non-lawyer where permitted by law.
- F. "Legal assistance providers" are those who provide services, legal assistance, and other counseling services and assistance.
- G. "Means test" means the use of the income, assets, or other resources of an older person, family caregiver, or the households thereof to deny or limit that person's eligibility to receive services under this part.

3. POLICY

The Department supports the provision of legal assistance to ensure the rights and entitlements of older adults by providing them with, or helping them secure, legal assistance.

- A. Allowable Services: Providers of legal assistance, funded by the department, must provide such services to New Mexicans age 60 or older and others as described in contracts supported by state funds. Allowable services include, but are not limited to:
 - 1. direct service delivery programs using staff attorneys, paralegals, law students and/or other non-lawyers under the direct supervision of an attorney;
 - 2. legal clinics which combine education addressing specific legal issues or topics of concern to older individuals, outreach and intake efforts that target those in greatest social and economic need, and the direct provision of legal advice, representation, and follow-up services to individuals in attendance;
 - 3. interactive workshops at which the individuals in attendance are counseled and provided with direct legal assistance with regard to legal and elder rights issues;
 - 4. referral programs enlisting the services of a panel of volunteer attorneys to provide direct *pro bono* legal assistance;
 - 5. impact case work, for example, lawsuits that benefit entire classes of clients, nursing home reform efforts, and Medicaid advocacy;
 - 6. the production and provision of educational materials and other legal resources for the benefit of New Mexicans age 60 or older and others as described in contracts supported by state funds; and
 - 7. any programs using any combinations of the activities described above.
- B. Legal assistance services cannot include legal representation in any fee generating case, unless other adequate representation is unavailable or there is an emergency requiring immediate legal action.

4. PROCEDURE

- A. ALTSD shall designate the minimum proportion of Title III, part B funds and require the expenditure of at least that sum for each planning and service area for the purpose of procuring contract(s) for legal assistance.
- B. Area Agency on Aging Requirements
 - 1. Adequate proportion funding. The area agency on aging shall award at a minimum the required adequate proportion of Title III, part B funds designated by the State agency to procure legal assistance for older residents of the planning and service area.
 - 2. Standards for Selection of Legal Assistance Providers. Area agencies on aging shall adhere to the following standards in selecting legal assistance providers:
 - a. The Area Agency on Aging must select and procure through contract the legal assistance provider or providers best able to provide legal assistance as provided in this paragraph (c)(2) and paragraphs (d) through (f) of this section.
 - b. The area agency on aging must select the legal assistance provider(s) that best demonstrate the capacity to conduct legal assistance, which means having the requisite expertise and staff to fulfill the requirements of the Act and all applicable Federal requirements for provision of legal assistance.
 - c. Selected legal assistance providers shall exhibit the capacity to:
 - i. Retain staff with expertise in specific areas of law affecting older individuals with economic or social need, including the priority areas identified in the Act;

- ii. Demonstrate expertise in specific areas of law that are given priority in the Act, including income and public entitlement benefits, health care, long-term care, nutrition, consumer law, housing, utilities, protective services, abuse, neglect, age discrimination, and defense of guardianship, prioritizing focus from among the areas of law based on the needs of the community served;
 - iii. Provide effective administrative and judicial advocacy in the areas of law affecting older individuals with greatest economic need or greatest social need;
 - iv. Support other advocacy efforts, for example, the Long-Term Care Ombudsman Program, including requiring a memorandum of agreement between the State Long-Term Care Ombudsman and the legal assistance provider(s) as required by section 712(h)(8) of the Act ([42 U.S.C. 3058g\(h\)\(8\)](#)); and
 - v. Effectively provide legal assistance to older individuals residing in congregate residential long-term settings as defined in the Act in [section 102\(35\)](#) ([42 U.S.C. 3002\(35\)](#)), or who are isolated as defined in the Act in [section 102\(24\)\(c\)](#) ([42 U.S.C. 3002\(24\)\(c\)](#)), or who are restricted to the home due to cognitive or physical limitations.
3. Standards for contracting between Area Agencies on Aging and legal assistance providers:
- a. The area agency on aging shall enter into a contract(s) with the selected legal assistance provider(s) that demonstrate(s) the capacity to deliver legal assistance.
 - b. The contract shall specify that legal assistance provider(s) shall demonstrate capacity to:
 - i. Maintain expertise in specific areas of law that are to be given priority, as defined in this section.
 - ii. 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.
 - iii. Maintain staff with the expertise, knowledge, and skills to deliver legal assistance as described in this section.
 - iv. Engage in reasonable efforts to involve the private bar in legal assistance activities authorized under the Act, including groups within the private bar furnishing services to older individuals on a pro bono and reduced fee basis.
 - v. Ensure that attorneys and personnel under the supervision of attorneys providing legal assistance will adhere to the applicable Rules of Professional Conduct including, but not limited to, the obligation to preserve the attorney-client privilege.
 - c. The contract shall include provisions:
 - i. Describing the duty of the area agency to refer older adults to the legal assistance provider(s) with whom the area agency contracts. In fulfilling this duty, the area agency is precluded from requiring a pre-screening of older individuals seeking legal assistance or from acting as the sole and exclusive referral pathway to legal assistance.
 - ii. Requiring the contracted legal assistance provider(s) to maintain capacity to provide legal assistance in the preferred language used by older individuals seeking and/or receiving legal assistance who are limited English proficient (LEP), including in oral and written communication, and to ensure effective communication for individuals with disabilities, including by providing appropriate auxiliary aids and services where necessary.
 - iii. Providing that the area agency will provide outreach activities that will include information about the availability of legal assistance to address problems experienced by older adults that may have legal solutions, such as those referenced in sections 306(a)(4)(B) and 306(a)(19) of the Act ([42 U.S.C. 3026\(a\)\(4\)\(B\)](#) and [3026\(a\)\(19\)](#)).

This includes outreach to:

1. Older adults with greatest economic need due to low income and to those with greatest social need, including minority older individuals, and
2. Older adults of underserved communities, including:
 - A. Older adults with limited–English proficiency and/or whose primary language is not English;
 - B. Older adults with severe disabilities;
 - C. Older adults living in rural areas;
 - D. Older adults at risk for institutional placement; and
 - E. Older adults with Alzheimer's disease and related disorders with neurological and organic brain dysfunction and their caregivers.
- d. Providing that legal assistance provider attorney staff and non-attorney personnel under the supervision of legal assistance attorneys must adhere to the applicable State Rules of Professional Conduct.
- e. Requiring that if the legal assistance provider(s) contracted by the area agency is located within a Legal Services Corporation grantee entity, that the legal assistance provider(s) shall adhere to the specific restrictions on activities and client representation in the Legal Services Corporation Act ([42 U.S.C. 2996 et seq.](#)). Exempted from this requirement are:
 - i. Restrictions governing eligibility for legal assistance under such Act;
 - ii. Restrictions for membership of governing boards; and
 - iii. Any additional provisions as determined appropriate by the Assistant Secretary for Aging.

C. Legal assistance provider requirements:

1. Legal assistance providers under contract with the State agency in States with single planning and service areas or area agency in States with multiple planning and service areas shall adhere to the following requirements:
 - a. Provide legal assistance to meet complex and evolving legal needs that may arise involving a range of private, public, and governmental entities, programs, and activities that may impact an older adult's independence, choice, or financial security.
 - b. Maintain the capacity for and provision of effective administrative and judicial representation including the expertise and ability to provide the range of services necessary to adequately address the needs of older adults through legal assistance in administrative and judicial forums, as required under the Act. This includes providing the full range of legal services, from brief service and advice through representation in administrative and judicial proceedings.
 - c. Conduct administrative and judicial advocacy as is necessary to meet the legal needs of older adults with economic or social need, focusing on such individuals with the greatest economic need or greatest social need.
 - d. Maintain the expertise required to capably handle matters related to the priority case type areas specified under the Act, including income and public entitlement benefits, health care, long-term care, nutrition, housing, utilities, protective services, abuse, neglect, age discrimination and defense of guardianship.
 - e. Maintain the expertise required to deliver any matters in addition to those specified in this section that are related to preserving, maintaining, and restoring an older adult's independence, choice, or financial security.
 - f. Maintain the expertise and capacity to deliver a full range of legal assistance, from brief service and advice through representation in hearings, trials, and other administrative and judicial proceedings in the areas of law affecting such older individuals with economic or social need.
 - g. Maintain the capacity to provide effective legal assistance and legal support to other advocacy efforts, including, but not limited to, the Long–Term Care Ombudsman Program serving the planning and service area, as required by section 712(h)(8) of the Act ([42 U.S.C. 3058g\(h\)\(8\)](#)),

and maintain the capacity to form, develop and maintain partnerships that support older adults' independence, choice, or financial security.

- h. Maintain and exercise the capacity to effectively provide legal assistance to older adults regardless of whether they reside in community or congregate settings, and to provide legal assistance to older individuals who are confined to their home, and older adults whose access to legal assistance may be limited by geography or isolation.
- i. Maintain the capacity to provide legal assistance in the preferred language used by older individuals seeking and/or receiving legal assistance who are limited-English proficient (LEP), including in oral and written communication. This includes taking reasonable steps to ensure meaningful access to legal assistance by older individuals with limited English-speaking proficiency and other communication needs.
- j. Such reasonable steps require an individualized assessment of the needs of individuals who are seeking legal assistance and legal assistance clients to understand and participate in the legal process (as determined by each individual); and
- k. Legal assistance provider(s) are responsible for providing access to interpretation, translation, and auxiliary aids and services to meet older individuals' legal assistance needs.
- m. Maintain staff with knowledge of the unique experiences of older adults with economic or social need and expertise in areas of law affecting such older adults.
- n. Meet the following legal assistance provider requirements:
 - i. A legal assistance provider may not require an older person to disclose information about income or resources as a condition for providing legal assistance under this part.
 - ii. A legal assistance provider may ask about the person's financial circumstances as a part of the process of providing legal advice, counseling, and representation, or for the purpose of identifying additional resources and benefits for which an older person may be eligible.
 - iii. A legal assistance provider and its attorneys may engage in other legal activities to the extent that there is no conflict of interest nor other interference with their professional responsibilities under this Act.
 - iv. Legal assistance providers that are not housed within Legal Services Corporation grantee entities shall coordinate their services with existing Legal Services Corporation projects to concentrate funds under this Act in providing legal assistance to older adults with the greatest economic need or greatest social need.
 - v. Nothing in this section is intended to prohibit any attorney from providing any form of legal assistance to an eligible client, or to interfere with the fulfillment of any attorney's professional responsibilities to a client.
 - vi. Legal assistance provider attorney staff and non-attorney personnel under the supervision of legal assistance attorneys must adhere to the applicable Rules of Professional Conduct.

2. Restrictions on legal assistance providers include:

- a. No legal assistance provider(s) shall use funds received under the Act to provide legal assistance in a fee generating case unless other adequate representation is unavailable or there is an emergency requiring immediate legal action. All providers shall establish procedures for the referral of fee generating cases.
- b. Other adequate representation is deemed to be unavailable when:
 - i. Recovery of damages is not the principal object of the client; or
 - ii. A court appoints a provider or an employee of a provider pursuant to a statute or a court rule or practice of equal applicability to all attorneys in the jurisdiction; or

- iii. An eligible client is seeking benefits under Title II of the Social Security Act ([42 U.S.C. 401 et seq.](#)), Federal Old Age, Survivors, and Disability Insurance Benefits; or Title XVI of the Social Security Act ([42 U.S.C. 1381 et seq.](#)), Supplemental Security Income for Aged, Blind, and Disabled.
 - c. A provider may seek and accept a fee awarded or approved by a court or administrative body or included in a settlement.
 - d. When a case or matter accepted in accordance with this section results in a recovery of damages, other than statutory benefits, a provider may accept reimbursement for out-of-pocket costs and expenses incurred in connection with the case or matter.
 - e. A legal assistance provider shall not represent a petitioner for imposition of guardianship except in limited circumstances involving guardianship proceedings of older individuals who seek to become guardians only if other adequate representation is unavailable in the proceedings, and the provider has exhausted, and documents efforts made to explore less restrictive alternatives to guardianship.
3. Legal assistance provider prohibited activities.
- a. A provider, employee of the provider, or staff attorney shall not engage in the following prohibited political activities:
 - i. No provider or its employees shall contribute or make available funds, personnel, or equipment provided under the Act to any political party or association or to the campaign of any candidate for public or party office; or for use in advocating or opposing any ballot measure, initiative, or referendum;
 - ii. No provider or its employees shall intentionally identify the Title III program or provider with any partisan or nonpartisan political activity, or with the campaign of any candidate for public or party office; or
 - iii. While engaged in legal assistance activities supported under the Act, no attorney shall engage in any political activity.
 - b. No funds made available under the Act shall be used for lobbying activities including, but not limited to, any activities intended to influence any decision or activity by a nonjudicial Federal, State, or local individual or body.
 - c. While carrying out legal assistance activities and while using resources provided under the Act, by private entities or by a recipient, directly or through a subrecipient, no provider or its employees shall:
 - i. Participate in any public demonstration, picketing, boycott, or strike, whether in person or online, except as permitted by law in connection with the employee's own employment situation;
 - ii. Encourage, direct, or coerce others to engage in such activities; or
 - iii. At any time engage in or encourage others to engage in rioting or civil disturbance, activity in violation of an outstanding injunction of any court of competent jurisdiction, or any illegal activity.
 - d. None of the funds made available under the Act may be used to pay dues exceeding a reasonable amount per legal assistance provider per annum to any organization (other than a bar association), a purpose or function of which is to engage in activities prohibited under these regulations. Such dues may not be used to engage in activities for which Older Americans Act funds cannot be directly used.

Revision History

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