NO: _____

IN THE
UNITED STATES SUPREME COURT

Northwestern Illinois Area Agency on Aging

Petitioner,

v.

Paula Basta, in her capacity as Director of the Illinois Department on Aging

Respondent.

On Petition for Writ of Certiorari
to the Illinois Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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1. The questions presented for review

A. Does the Older Americans Act intend for State Ombudsman to be independent advocates representing the interests of facility residents to government officials?

B. Are area agencies on aging as public advocates under the Older Americans Act able to bring litigation to protect older adults from government actions?

2. List of Parties

All parties are listed in the caption.

3. Corporate Disclosure Statement

The Northwestern Illinois Area Agency on Aging (NIAAA) is a private Illinois nonprofit with no parent corporation or publicly held stock.

4. List of prior proceedings

This case arises from the following proceedings:

• *The Nw. Ill. Area Agency On Aging v. Basta*, 128788 (Ill. 2022) (final judgment entered January 19, 2023).

• *The Nw. Ill. Area Agency On Aging v. Basta*, 2022 IL App (2d) 210234 (Ill. App. 2022) (final judgment entered July 28, 2022).

• *The Nw. Ill. Area Agency On Aging v. Basta* 2020-MR-38 (17th Circ. 2020) (final judgment entered April 7, 2021).

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5. Citations of the official and unofficial reports below

The trial court, the Seventeenth Judicial Circuit of Illinois, granted Defendant Basta's motion to dismiss with an unpublished order on April 7, 2021. Plaintiff appealed and the Appellate Court of Illinois Second District issued a published opinion, *The Nw. Ill. Area Agency On Aging v. Basta*, 2022 IL App (2d) 210234, on June 29, 2022. Plaintiff filed a Petition for Rehearing and the appellate court denied the petition on July 28, 2022. Plaintiff filed Petition for Leave to Appeal in the Illinois Supreme Court, and the Supreme Court denied the petition on November 30, 2022. Plaintiff filed for reconsideration and the Supreme Court denied the petition for reconsideration on January 19, 2023.

6. Jurisdiction

A. The date the judgment or order sought to be reviewed was entered June 29, 2022 in the Appellate Court of Illinois Second District.

B. Plaintiff filed a Petition for Rehearing and the appellate court denied the petition on July 28, 2022. Plaintiff filed Petition for Leave to Appeal in the Illinois Supreme Court, and the Supreme Court denied the petition on November 30, 2022. Plaintiff filed for reconsideration and the Supreme Court denied the petition for reconsideration on January 19, 2023.

C. This Court's jurisdiction is invoked under 28 U.S.C. § 1257 and United States Supreme Court Rule 13.

7. Relevant constitutional provisions, statutes, regulations

The following federal constitutional, statutory and regulatory provisions are involved in this case and reproduced in the appendix: 42 U.S.C. § 3058g; 45 C.F.R. § 1321.61; 45 C.F.R. §§ 1324.11, 1324.13, 1324.21.

8. Facts

A. Parties

1. NIAAA and Department

Plaintiff, the Northwestern Illinois Area Agency on Aging (NIAAA), is a small non-profit[1] located in Rockford, Illinois and is one of the nationwide 618[2] area agencies on aging[3] (AAAs). The typical AAA is a private nonprofit[4] with limited resources who

[1] NIAAA is a private nonprofit with nine employees.

[2] ELDER CARE LOCATOR, https://eldercare.acl.gov/Public/About/Aging_Network/Index.aspx (last visited February 17, 2023).

[3] 42 U.S.C § 3002(6).

[4] "The structure of AAAs varies. The majority operate as … [i]ndependent, nonprofit agencies." National Association of Area

receives nearly half of its funding through the Older Americans Act[5] (OAA). The OAA designates the AAAs as "public advocates" who are required to "represent the interests of older persons to executive branch officials" [6] such as the Defendant who is Director of the Illinois Department on Aging (Department) which is a billion dollar[7] Illinois state agency. The legal definition of a 'public advocate' is:

> An advocate who intends to represent matters of public concern for the public at large. It is a governmental position similar to an ombudsman. A public advocate can be either an elected or appointed position, depending upon the jurisdiction. The public advocate's right to bring suit to implement the public advocate's power, even though not specifically set forth, is implied from the functional responsibility of the

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Agencies on Aging, *Trends and New Directions: Area Agencies on Aging Survey 2014*, 15, https://www.usaging.org/files/AAA%202014%20Survey.pdf.

[5] "More than half of AAAs have a budget below $3.9 million … The average AAA continues to receive about 40 percent of its budget from the OAA." *Trends and New Directions: Area Agencies on Aging Survey 2014*, 13, https://www.usaging.org/files/AAA%202014%20Survey.pdf.

[6] 45 C.F.R. 1321.61(a)-(b).

[7] Illinois Department on Aging, *Fiscal Year 2020 Enacted Budget*, https://ilaging.illinois.gov/content/dam/soi/en/web/aging/documents/final-idoa-fy20-revised-w-enacted-0612.pdf.

> public advocate to investigate abuses in government.[8]

As the public advocate, NIAAA is required by both the OAA[9] and the Department's own regulation[10] to protect the interests of 2.3 million vulnerable older adults in Illinois from actions of governmental entities.[11] *Basta*, in sustaining the dismissal (Dismissal) of NIAAA's complaints, fails to acknowledge that NIAAA is a public advocate representing older adults.

As an AAA, NIAAA is part of the nationwide 'aging network' (Aging Network) which is comprised of state agencies on aging (State Agencies) such as the Department.[12] The number of Americans age 60 and older served by the Aging Network increased by 34% from 55.7 million to 74.6 million between 2009 and 2019.[13] In 2019, nearly 11 million older adults

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[8] USLEGAL https://definitions.uslegal.com/p/public-advocate/ (last visited Feb. 17, 2023).

[9] 45 C.F.R. 1321.61.

[10] 89 Ill. Admin. Code § 230.150(a)(3); 45 C.F.R. 1321.61.

[11] Second District Appellate Court Petition for Rehearing, 23.

[12] 42 U.S.C. § 3002(5).

[13] ACL, *2020 Profile of Older Americans*, https://acl.gov/sites/default/files/aging%20and%20Disability%20In%20America/2020Profileolderamericans.final_.pdf.

received OAA services[14] nationwide from the Aging Network which includes, for example, about 2.4 million home delivered meals annually.[15]

2. Illinois Ombudsman

Kelly Richards, the Illinois State Long-Term Care Ombudsman (Illinois Ombudsman) was requested to be made a party to this litigation by NIAAA but that request was denied because *Basta* concluded that the Department and the Illinois Ombudsman have the same legal interests under the OAA.[16]

The purpose of the State Long-Term Care Ombudsman (State Ombudsman) is to provide advocacy for residents (Residents) of long-term care facilities.[17] "Long-term care Ombudsmen are advocates for residents of nursing homes, board and

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[14] Congressional Research Service, *Older Americans Act Overview and Funding* (2022), https://crsreports.congress.gov/product/pdf/R/R43414 (last visited Feb. 17, 2023).

[15] MEALS ON WHEELS AMERICA, https://www.mealsonwheelsamerica.org/learn-more/what-we-deliver (last visited Feb. 17, 2023).

[16] *The Nw. Ill. Area Agency On Aging v. Basta*, 2022 IL App (2d) 210234, ¶ 82.

[17] "The purpose of the Long Term Care Ombudsman Program is to ensure that older persons and persons with disabilities receive quality services. This is accomplished by providing advocacy services for residents of long term care facilities and participants receiving home care and community-based care."20 ILCS 105/4.04.

care homes and assisted living facilities."[18] "In its establishment of the Ombudsman program, ACL requires that the [Illinois] Office of the State Long-Term Care Ombudsman be a 'distinct entity, separately identifiable' in order to provide ease of access for residents and complainants and to effectively meet other statutory requirements of the [Illinois Ombudsman] Office."[19]

According to the National Long-Term Care Ombudsman Resource Center,[20] the OAA:

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[18] National Long-Term Care Ombudsman Resource Center, *About the Ombudsman* Program, https://ltcombudsman.org/about/about-ombudsman#Ombudsman (last visited Mar. 9, 2023). The National Long-Term Care Ombudsman is funded by ACL. National Long-Term Care Ombudsman Resource Center, *About NORC*, https://ltcombudsman.org/about (last visited Mar. 9, 2023). "The Ombudsman is an independent officieal who has been appointed to investigate complaints that people make against the government or public organizations." Collins Dictionary, *Definition of 'ombudsman'*, https://www.collinsdictionary.com/us/dictionary/english/ombudsman (last visited Mar. 9, 2023).

[19] Administration for Community Living, *Long-Term Care Ombudsman Program FAQ*, https://acl.gov/programs/long-term-care-ombudsman/long-term-care-ombudsman-faq (last visited Mar. 9, 2023).

[20] "The National Long-Term Care Ombudsman Resource Center provides support, technical assistance and training to the 53 State Long-Term Care Ombudsman Programs and their statewide networks. The Center's objectives are to enhance the skills, knowledge, and management capacity of the State programs to enable them to handle residents' complaints and represent resident interests in both individual and systems advocacy." National Ombudsman Resource Center, *About*

> Clearly require[s] ombudsmen to advocate in relation to the development and implementation of laws, regulations, and administrative action that affect residents. As an employee [of state government], the…[ombudsman] has a "function," an assigned role within the government system, which requires a loyalty not to the agency, but to those residents potentially adversely affected by the actions of the agency or government. By law, the ombudsman is a surrogate voice for residents of long-term care facilities. The ombudsman fulfills his or her loyalty to the employing entity by serving as an agent of residents. Thus, the…[ombudsman] must view his or her primary role as one of being the resident's voice within a system, instead of viewing the primary role as being an employee within a larger [State] agency." [21]

The Illinois Ombudsman is responsible for about 1,200 long-term care facilities serving more than 100,000 Residents in Illinois.[22] Nationwide there are

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NORC, https://ltcombudsman.org/about (last visited Mar. 9, 2023).

[21] National Long-Term Care Ombudsman Resource Center, *History and Role of the Long-Term Care Ombudsman Program*, 20 (Sept. 2008) https://ltcombudsman.org/uploads/files/support/history-and-role-updated.pdf.

[22] IDPH, *Nursing Homes,* https://dph.illinois.gov/topics-services/health-care-regulation/nursing-homes.html (last visited Mar. 9, 2023).

State Ombudsman programs operating in all fifty states[23] serving Residents in about 15,600 long-term care facilities which contain about 1.7 million licensed beds.[24] In 2010, State Ombudsman nationwide investigated 211,937 complaints from or concerning Residents.[25]

Of the 50 ombudsman programs nationwide, 37[26] are "organizationally attached"[27] to State Agencies such as the Department. Since the Illinois Ombudsman is attached to the Department, the Department is required to identify and remove[28] any appearance of any conflict of interests[29] with the

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[23] Long-Term Care Ombudsman Program, Administration for Community Living https://acl.gov/programs/Protecting-Rights-and-Preventing-Abuse/Long-term-Care-Ombudsman-Program (last visited Mar. 9, 2023).

[24] Centers for Disease Control and Prevention, *Nursing Home* Care, https://www.cdc.gov/nchs/fastats/nursing-home-care.htm (last visited Mar. 9, 2023)

[25] National Long-Term Care Ombudsman Resource Center, *History and Role of the Long-Term Care Ombudsman Program*, 4 (Sept. 2008) https://ltcombudsman.org/uploads/files/support/history-and-role-updated.pdf.

[26] National Long-Term Care Ombudsman Resource Center, *History and Role of the Long-Term Care Ombudsman Program*, 14 (Sept. 2008) https://ltcombudsman.org/uploads/files/support/history-and-role-updated.pdf.

[27] 45 C.F.R. § 1324.21(b)(2).

[28] 89 Ill. Admin. Code § 270.130.

[29] 89 Ill. Admin. Code § 270.130.

Illinois Ombudsman. A conflict can only remedied if it does not "compromise the ability of the Ombudsman to carry out the duties of the Program as an *independent advocate* for residents [emphasis added]."[30]

B. Factual summary from Illinois Appellate Court

The *Northwestern Illinois Area Agency on Aging v. Basta*[31] summarizes the background of this litigation as follows [internal citations omitted]:

A. The Parties

> Defendant is the current director of the Department. The Department administers programs for senior citizens in Illinois, including receiving and disbursing federal funds made available to it under the legislation originally enacted as the Older Americans Act of 1965, now codified as amended at 42 U.S.C. § 3001 *et seq*. (Older Americans Act). In implementing the Older Americans Act, the Department designates public and private nonprofit organizations throughout Illinois as "area agenc[ies] on aging" (AAAs), each of which provides services to senior citizens within a specific geographic area. Under the Older

[30] 89 Ill. Admin. Code § 270.230(c).

[31] *Northwestern Illinois Area Agency on Aging v. Basta*, 2022 IL App (2d) 210234.

Americans Act, the United States Department of Health and Human Services (HHS) distributes federal funds to the Department, which then distributes those funds to the AAAs. In turn, AAAs "make subgrants or contracts to service providers" that offer various services to older adults. Plaintiff, a private nonprofit entity, is the AAA for Area 1, which comprises the [Illinois] counties of Jo Daviess, Stephenson, Winnebago, Boone, Carroll, Ogle, De Kalb, Whiteside, and Lee.

The Department may also disburse Older Americans Act funds for the State Long-Term Care Ombudsman program, which is designed to investigate and act on complaints regarding longterm *[sic]* care facilities. Although the Department appoints the State Long-Term Care Ombudsman (Ombudsman) and operates the Ombudsman's office, that office is separate from the Department's other divisions.

B. The Illinois Administrative Procedure Act

The Act sets forth the requirements for the promulgation of rules by administrative agencies. The Act applies to the Department. The Act defines a "rule" as an "agency statement of general applicability that implements, applies, interprets, or prescribes law or policy."…

> Administrative rulemaking under the Act involves a three-step process. The first step, known as the first notice period, gives notice of the proposed rule in the Illinois Register. The public has 45 days from the date the notice is published in which to comment … At the end of the first notice period begins the second notice period, during which the agency must submit certain information to [the Joint Committee on Administrative Rules] JCAR in a document called a second notice. JCAR is a bipartisan, bicameral legislative-support-services agency that reviews proposed and existing rules as well as agencies' compliance with the rulemaking procedure. The second notice period is also known as the legislative review period.…The third and final step is adoption of the rule.… In ruling on [the Defendant's] motion to dismiss, all well-pleaded facts and all reasonable inferences that may be drawn from those facts are accepted as true.…[32]

[32] *Northwestern Illinois Area Agency on Aging v. Basta*, 2022 IL App (2d) 210234, ¶7-12, 31.

C. Substantial Justice Required in Motions to Dismiss

In ruling on the Department's motion to dismiss, the complaint must be "liberally construed with a view to doing substantial justice between"[33] (Substantial Justice Standard) NIAAA and the Department. The Substantial Justice Standard, which is about fairness, means that:

- "Pleadings are not intended to create obstacles of a technical nature to prevent reaching the merits of a case, but instead are intended to facilitate the resolution of real and substantial controversies [internal quotes omitted]";[34] and

- "No pleading is bad in substance which contains such information as reasonably informs the opposite party of the nature of the claim or defense which he or she is called upon to meet."[35]

While *Basta* does acknowledge[36] it must construe facts (Fact Standard) and all reasonable inferences

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[33] 735 ILCS 5/2-603(c).

[34] *Norman A. Koglin Associates v. Valenz Oro, Inc.,* 680 N.E.2d 283, 288 (Ill. 1997) (citing *People ex rel. Scott v. College Hills Corp.*, 91 Ill.2d 138, 145, 61 Ill.Dec. 766, 435 N.E.2d 463 (1982)).

[35] 735 ILCS 5/2-612(c).

[36] *Basta*, 2022 IL App (2d) 210234 at ¶31.

from those facts to favor NIAAA in the motion to dismiss, *Basta* fails to mention substantial justice/fairness in upholding the Dismissal.

D. NIAAA's Complaint

NIAAA filed in the Seventeenth Illinois Judicial Circuit Court a complaint (Complaint) on January 16, 2020 alleging that the Department is using three invalid rules to regulate the conduct of NIAAA and NIAAA's grantees.[37] Count I of the Complaint alleges that the entire *Area Agencies on Aging Policies and Procedures Manual* (Manual) is an invalid rule because it was not approved through the rule process (Rule Process) contained in the Illinois Administrative Procedure Act[38] (Procedure Act). The Complaint alleges that the official copy of the Manual is on file in the Rockford, Illinois office of NIAAA.[39] The administrative rules regarding AAAs operations were approved in 1985 and are about 15 pages in length, while the Manual with exhibits is about 500 pages in length.[40] Count II alleges that the Department's *Evaluation, Monitoring and Special Reviews Policy* (Monitoring Rule) is an invalid administrative rule, and Count III alleges that the *Area Agency on Aging Meetings Transparency Policy*

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[37] C 5-27 (Complaint).

[38] 5 ILCS 100/1, et seq; C 7 (Complaint).

[39] C 7 (Complaint).

[40] C 24 (Brief in Support of Complaint).

(Transparency Rule) is an invalid administrative rule.[41] In its Brief in Support of Complaint, NIAAA alleges the Department has been circumventing the mandatory Rule Process for decades to avoid legislative oversight.[42]

Count III alleges that the Transparency Rule was added to the Manual in March 16, 2018 and that the Manual is the Department's official document for regulating AAAs.[43] The Department filed a motion to dismiss which disputed the factual allegations[44] of Count III of the Complaint, and on July 30, 2020, the trial court dismissed Count III of the Complaint with prejudice by agreeing with the Department's factual allegation that the Transparency Rule is not the Department's policy.[45]

NIAAA then filed an amended complaint[46] (Amended Complaint), on August 12, 2020 in the Illinois Circuit Court. [47] The Amended Complaint

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[41] C 7 (Complaint).

[42] C 24 (Brief in Support of Complaint).

[43] C 7 (Complaint).

[44] C 37 Defendant's Motion to Dismiss.

[45] A 82 – 83 (Order RE Dismissal of Counts); R 21 (Report of Proceedings of Motion to Dismiss).

[46] C 628 (Order RE Leave Given to File)

[47] C 580 (First Amended Complaint).

alleges that the Department has issued six rules (Six Rules) that are illegal because they were not approved through the Rule Process.[48] The Six Rules are the: 1. Manual (Count I of Amended Complaint); 2. Monitoring Rule (Count II); 3. Tracking Rule (Count III); 4. Illinois Ombudsman Conflicts Rule (Count IV); 5. Medicaid CCP Rule (Count V); and 6. ROS Rule (Count VI).[49]

Count IV of the Amended Complaint pertains to the Illinois Ombudsman Conflicts Rule which is implementing an OAA conflict of interest regulation[50] (OAA Conflicts Regulation). *Basta* acknowledges[51] that the Illinois Ombudsman Conflicts Rule is implementing the OAA Conflicts Regulation and does not dispute that the purpose of the OAA Conflicts Regulation is for "the State agency and the Ombudsman…[to] identify and take steps to remove or remedy conflicts of interest between the [Ombudsman] Office and the State agency…"[52]

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[48] C 585 – 86 (First Amended Complaint).

[49] C 585 – 86 (First Amended Complaint).

[50] 45 C.F.R. § 1324.21.

[51] "Plaintiff contends that the Ombudsman's interests are adverse to those of the Department because the purpose of the federal law upon which the Conflict-of-Interest Form is based is to resolve conflicts between the Department and the Ombudsman [internal quotes omitted]." *Basta*, 2022 IL App (2d) 210234 at ¶82.

[52] 45 C.F.R. § 1324.11(b).

E. OAA provisions about State Ombudsman independence

The OAA contains numerous provisions addressing the relationship between the State Ombudsman and the State Agency. These obligations include requiring the State Ombudsman to:

- Ensure that the Ombudsman Office is "a distinct entity, separately identifiable" from the State Agency;[53]

- "Identify, investigate, and resolve complaints that relate to action, inaction, or decisions [of State Agencies], that may adversely affect the … welfare … or rights of residents";[54]

- "Represent the interests of residents before governmental agencies";[55]

- "Pursue (as the Ombudsman determines as necessary and consistent with resident interests) administrative, legal, and other remedies to protect the health, safety, welfare, and rights of residents" from the actions of State Agencies;[56]

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[53] 45 C.F.R. § 1324.11(b)(1).

[54] 45 C.F.R. § 1324.13(a)(1).

[55] 45 C.F.R. § 1324.13(a)(5).

[56] 45 C.F.R. § 1324.13(a)(5).

- Make "determinations and positions [which] shall be those of the [Ombudsman] Office and shall not necessarily represent the determinations or positions of the State agency";[57]

- "Ensure that willful interference with representatives of the [Ombudsman] Office in the performance of the official duties of the representatives [by the State Agency] … shall be unlawful … and provide for appropriate sanctions with respect to the interference";[58]

- "Ensure that … adequate legal counsel is available, and is able, without conflict of interest [with the State Agency], to … assist the … representatives of the [Ombudsman] Office in the performance of the official duties of the … representative";[59]

- Have "policies and procedures related to systems advocacy … [that] assure that the [Ombudsman] Office is required and has sufficient authority to carry out its responsibility to analyze, comment on, and monitor the development and

[57] 45 C.F.R. § 1324.13(a)(7)(vi).

[58] 42 U.S.C. 3058g(j)(1),(3).

[59] 42 U.S.C. §3058g(g)(1)(A)(ii).

implementation … [of] laws, regulations, and other government policies and actions" of the State Agency;[60]

- Ensure the State Agency does not have the "right to review or pre-approve positions or communications of the [Ombudsman] Office;[61]

- Have expertise in "consumer-oriented public policy advocacy";[62]

- "Ensure that the Ombudsman … shall be able to independently make determinations … [regarding] policies and actions pertaining to the health, safety, welfare, and rights of residents";[63]

- Ensure that the Department does "not operate the [Ombudsman] Office or carry out the program, directly, or by contract";[64]

- Refuse any "request [from the State Agency that] the Ombudsman … be responsible for

[60] 45 C.F.R. § 1324.11(e)(5).

[61] 45 C.F.R. § 1324.11(e)(5)(ii).

[62] 45 C.F.R. § 1324.11(d)(2).

[63] 45 C.F.R. § 1324.11(e)(8)(ii).

[64] 42 U.S.C. § 3058g(f)(2)(b)(i).

leading, managing or performing the work of non-ombudsman services or programs";[65]

- Ensure that the State Agency "not have personnel policies or practices which prohibit the Ombudsman from performing the functions and responsibilities of the Ombudsman";[66]

- Not permit State Agency access to "files, records, and other information maintained by the Ombudsman program";[67]

- "Provide services to protect the health, safety, welfare, and rights of the residents"[68] from actions of State Agencies; and

- "Identify and take steps to remove or remedy conflicts of interest between the Office and the State agency … and describe steps taken to remove or remedy conflicts within the annual report submitted [to ACL]".[69]

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[65] 45 C.F.R. § 1324.11(c).

[66] 45 C.F.R. § 1324.11(e)(1)(i).

[67] 45 C.F.R. § 1324.11(e)(3)(i).

[68] 45 C.F.R. § 1324.13(a)(2).

[69] 45 C.F.R. § 1324.21(b)(1).

The OAA also imposes numerous obligations on the State Agency regarding the State Ombudsman such as containing detailed instructions on how the State Agency must identify[70] and remove[71] conflicts of interest with the State Ombudsman. In the 37 states where the State Ombudsman is 'attached' to the State Agency (such as Illinois), the OAA Conflicts Regulation also requires the State Agency to:

(i) Take reasonable steps to avoid internal conflicts of interest;

(ii) Establish a process for review and identification of internal conflicts;

(iii) Take steps to remove or remedy conflicts;

(iv) Ensure that no individual, or member of the immediate family of an individual, involved in the designating, appointing, otherwise selecting or terminating the Ombudsman is subject to a conflict of interest; and

(v) Assure that the Ombudsman has disclosed such conflicts and described steps taken to remove or remedy conflicts within the annual report

[70] 45 C.F.R. § 1324.21(c).

[71] 45 C.F.R. § 1324.21(d).

> submitted to the Assistant Secretary through the National Ombudsman Reporting System.[72]

If a State Agency is unable to eliminate the conflict of interest of having a State Ombudsman attached to the State Agency, then the State Agency is ***required*** under the OAA Conflicts Regulation to contract with an external organization to perform the State Ombudsman function.[73]

F. *Basta's* Refusal to Add Ombudsman as a Party

On September 23, 2020, the Department filed a motion to dismiss the Amended Complaint.[74] Regarding the request to dismiss Count IV, the Department made representations to the circuit court on behalf of the Illinois Ombudsman such as:

- "The [Illinois] Long-Term Care Ombudsman requires AAAs to complete an annual conflict of interest form";[75]

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[72] 45 C.F.R. § 1324.21(b)(2).

[73] 45 C.F.R. § 1324.21(b)(3).

[74] C 633 (Defendant's Motion to Dismiss Plaintiff's Amended Complaint).

[75] C 633 (Defendant's Motion to Dismiss Plaintiff's Amended Complaint).

- "The [Illinois Ombudsman's] Conflict of Interest Checklist Form is a standardized form";[76]

- "The [Illinois] Ombudsman Program requires AAA *[sic]* to complete this form in order to comply with its obligations."[77]

While the Department's motion to dismiss was pending, the Illinois Ombudsman on October 7, 2020 sent an email (Ombudsman Email) marked urgent to NIAAA demanding that NIAAA complete the Illinois Ombudsman Conflicts Rule inquiry (Conflicts Inquiry) or risk being terminated from managing the Ombudsman Program.[78] Count IV of the Amended Complaint alleges that the Conflicts Inquiry, which is an Exhibit to the Amended Complaint, is being used to implement the Illinois Ombudsman Conflicts Rule.[79] The Conflicts Inquiry is printed on letterhead that has both the Department's and Illinois Ombudsman's names with their logos.[80] The Ombudsman Email fails to acknowledge that the Amended Complaint is seeking to invalidate the

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[76] C 633 (Defendant's Motion to Dismiss Plaintiff's Amended Complaint).

[77] C 633 (Defendant's Motion to Dismiss Plaintiff's Amended Complaint).

[78] C 1124 (Motion to Add Party).

[79] C 585 (First Amended Complaint).

[80] C 605 (First Amended Complaint).

Illinois Ombudsman Conflicts Rule and the Conflicts Inquiry.[81]

On October 8, 2020, NIAAA filed in the Illinois circuit court a motion to add the Illinois Ombudsman (Motion to Add Ombudsman) as a necessary party[82] under an Illinois statute which states that "if a person, not a party, has an interest … which the judgment may affect, the court, on application, *shall* direct such person to be made a party [emphasis added]."[83] The Motion to Add Ombudsman alleges that the Illinois Ombudsman is a necessary party because the trial court declaring the Conflicts Inquiry invalid pursuant to Count IV will affect the rights of the Illinois Ombudsman since it is now clear that the Illinois Ombudsman Conflicts Rule is her policy.[84] During the hearing on the Motion to Add Ombudsman, the Department's attorney, Assistant Attorney General (AAG) Snitzer admitted that "I don't represent the Ombudsman at this stage."[85] The circuit court on October 14, 2020 denied the Motion to Add Ombudsman[86] because it would disrupt the

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[81] C 1124 (Motion to Add Party).

[82] C 1124 (Motion to Add Party).

[83] 735 ILCS 5/2-406.

[84] C 1124-25 (Motion to Add Party).

[85] R 1 (Report of Proceedings of Motion to Add Party).

[86] A 84 (Order RE Adding a Party).

briefing schedule.[87] On April 7, 2021, the circuit court granted the motion to dismiss the Amended Complaint.[88]

NIAAA filed a timely appeal of the circuit court's dismissal to the *Basta* court. While the appeal was pending before the *Basta* court, the Illinois Ombudsman on August 5, 2021 again sent NIAAA an email demanding that NIAAA complete another Conflicts Inquiry.[89] On August 9, 2021 NIAAA emailed the Department's attorney, AAG Mary LaBrec, to inform her that NIAAA would not be completing the August 5, 2021 Conflicts Inquiry.[90] In response, AAG LaBrec directed NIAAA to communicate directly with the Illinois Ombudsman about the Conflicts Inquiry and again admitted that the Office of the Illinois Attorney General does not represent the Illinois Ombudsman interests in this litigation.[91]

NIAAA filed on August 26, 2021 a Motion to Vacate the Dismissal of Count IV (Motion to Vacate) with the *Basta* court.[92] The Motion to Vacate cites

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[87] "I know I [Circuit Judge Fabiano] hate to do that [add the Ombudsman] in the middle of, of a briefing schedule …. " R 6 (Report of Proceedings of Motion to Add Party).

[88] A 62 (Trial Court Memorandum Opinion and Order).

[89] Motion to Vacate the Dismissal of Count IV, E2.

[90] Motion to Vacate the Dismissal of Count IV, E2-3.

[91] Motion to Vacate the Dismissal of Count IV, E3-4.

[92] Motion to Vacate the Dismissal of Count IV.

Certain Underwriters at Lloyd's London v. Burlington Ins. Co. which states that:

> A necessary party is one whose participation is required to … protect its interest in the subject matter of the controversy which would be materially affected by a judgment entered in its absence ... An order entered without jurisdiction over a necessary party will be void ... The failure to join a necessary party may be raised at any time: by the parties or by the trial court or by the appellate court *sua sponte*.[93]

The Motion to Vacate alleges the new evidence that while the appeal was pending before the *Basta* court, the Conflicts Inquiry was sent a third time to NIAAA and that AAG LaBrec admitted that the Department does not represent the Illinois Ombudsman.[94] *Basta*, nevertheless, refused to add the Illinois Ombudsman as a party[95] and upheld the dismissal of the Amended Complaint.[96]

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[93] *Certain Underwriters at Lloyd's London v. Burlington Ins. Co.*, 2015 IL App (1d) 1141408, ¶15.

[94] Motion to Vacate the Dismissal of Count IV.

[95] *Northwestern Illinois Area Agency on Aging v. Basta*, 2022 IL App (2d) 210234, ¶82.

[96] *Northwestern Illinois Area Agency on Aging v. Basta*, 2022 IL App (2d) 210234, ¶103.

9. Federal Issues Raised

The first federal issues raised in this case occurred on August 12, 2020 when NIAAA filed its *First Amended Complaint* in the Circuit Court of the 17th Judicial District (Trial Court). Count IV of the Complaint states that the Ombudsman Conflict's Rule is invalid,[97] and the Conflict's Rule, attached as an exhibit to the complaint, addresses 45 C.F.R. § 1324.21 and the duty of the Department and the Ombudsman to resolve potential conflicts of interest. On October 8, 2020, NIAAA filed its *Motion to Add Party* in the Trial Court and raised the issue that the Ombudsman should be added to the litigation because it is an adverse party to the Defendant because the purpose of the federal regulation cited in the Conflicts Form is to remedy conflicts of interest between the Defendant and Ombudsman.[98] In its Appellant Brief in the Second District Appellate Court of Illinois, on August 9, 2021, NIAAA reiterated the need to add the Ombudsman as a necessary party because of its directly adverse nature to the Defendant regarding the Conflict's Rule.[99] NIAAA again mentions this in its Petition for Rehearing filed on July 19, 2022.[100]

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[97] C 580 (First Amended Complaint).

[98] C 1124 (Motion to Add Party).

[99] Brief and Appendix of Plaintiff-Appellant, 21.

[100] Combined Petition for Rehearing in Appellate Court and Petition for Certification of Appeal to the Illinois Supreme Court, 17-18.

The second federal issues raised in this case occurred on September 29, 2020 when NIAAA filed its *Response to Defendant's Motion to Dismiss First Amended Complaint* in the Trial Court. In response to Defendant's assertion that NIAAA does not have legal standing to bring Counts V and VI of the complaint, NIAAA stated that it has been granted special legal status, under federal law, to bring litigation as the public advocate for older adults.[101] In its Appellate Brief in the Second District Appellate Court of Illinois, NIAAA again asserted its role and special status as the public advocate for older adults.[102] Again, on July 19, 2022, NIAAA reiterated that it has special status to bring litigation on the behalf of older adults because it is the designated public advocate under federal law.[103]

10. Argument

A. *Basta* eliminates State Ombudsman independence from State Agencies

The Petition should be granted because *Basta* endangers the safety of millions of vulnerable Residents nationwide by eliminating any pretense that the State Ombudsman is an independent

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[101] C 1112 (Response to Defendant's Motion to Dismiss First Amended Complaint).

[102] Brief and Appendix of Plaintiff-Appellant, 25.

[103] Combined Petition for Rehearing in Appellate Court and Petition for Certification of Appeal to the Illinois Supreme Court, 20.

advocate protecting Residents from actions of State Agencies. *Basta* in refusing to add the Illinois Ombudsman as a party makes the astonishing claim that "none of the statutory provisions [in the OAA]…*suggest* that the Department and the Ombudsman have adverse interests [emphasis added]"[104] as the Department and Illinois Ombudsman's share the same interests[105] regarding a policy (the Illinois Ombudsman Conflicts Rule) whose purpose is ensuring the independence of Office of the Illinois Ombudsman as "a distinct entity, separately identifiable"[106] from the Department.

Basta disregards the numerous provisions in the OAA discussed above which unambiguously make the Illinois Ombudsman and Department adverse parties by claiming that "plaintiff does not explain how these particular provisions [in the OAA] make the Ombudsman and the Department adverse parties"[107] which is, of course, absurd as the OAA emphatically speaks for itself in making the State Ombudsman directly adverse to the Department.

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[104] *Northwestern Illinois Area Agency on Aging v. Basta*, 2022 IL App (2d) 210234, ¶82

[105] "Plaintiff's arguments that the Department could not have adequately represented the interests of the Ombudsman lack merit." *Id.*

[106] 45 C.F.R. § 1324.11(b)(1).

[107] *Northwestern Illinois Area Agency on Aging v. Basta*, 2022 IL App (2d) 210234, ¶82.

Basta claiming there is nothing in the OAA to even suggest that the Illinois Ombudsman and the Department have different legal interests is an inexplicable interpretation as the OAA describing the adverse relationship between the parties is explicitly unique in federal/state law.[108] By comparison for example, NIAAA is an adverse party to the Department by a single federal provision[109] which is almost identical to the one OAA regulation[110] describing the Ombudsman's advocacy duties for protecting Residents from actions of the Department. NIAAA and the Illinois Ombudsman sharing the same adverse interests to the Department regarding the Illinois Ombudsman Conflicts Rule/Count IV is to be expected in protecting citizens from illegal government actions such as those alleged in the Amended Complaint.

Basta interpretating the OAA to mean that the Department and the Illinois Ombudsman share the same legal interests, unfortunately, means the Illinois Ombudsman is no longer being an independent advocate representing the welfare of Residents to the Department. Under *Basta*, the Illinois Ombudsman is now just another Department employee whose loyalty is to the bureaucracy with no ability to publicly disagree with the Department.

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[108] Note that all of the OAA requirements for the State Ombudsman program are also incorporated as requirements under Illinois law. 20 ILCS 105/4.04(c).

[109] 45 C.F.R. § 1321.61.

[110] 45 C.F.R. § 1324.13(a)(5).

For example, now that *Basta* has said that there is no distinction between the parties regarding the Illinois Ombudsman Conflicts Policy, the Department gets to dictate to the Illinois Ombudsman what she should report to ACL about the Department complying with the OAA Conflicts Regulation which effectively renders the regulation designed to ensure State Ombudsman independence meaningless. *Basta*, consequently, is a danger to millions of Residents in Illinois relying on the Illinois Ombudsman to function as an independent advocate protecting their welfare from Department actions.

As there are no reported federal cases regarding the relationship between State Ombudsman and State Agencies, it is expected that *Basta* as a precedent will be used by State Agencies nationwide to reduce and/or eliminate the independence of State Ombudsman so they do not function as the 'Residents voice within a system'[111] challenging State Agency actions. Since State Agencies improperly eroding the independence of the State Ombudsman is apparently such a prevalent problem that it was necessary to implement the OAA Conflicts Regulation in 2015, it is expected that State Agencies will now seize on *Basta* to circumvent the OAA Conflicts Regulation. For the 37 State Ombudsman programs that are attached to State Agencies such as in Illinois, *Basta* means that those State Ombudsman programs will likely be completely subsumed into the bureaucracies. The Petition

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[111] National Long-Term Care Ombudsman Resource Center, *History and Role of the Long-Term Care Ombudsman Program*, 20 (Sept. 2008) https://ltcombudsman.org/uploads/files/support/history-and-role-updated.pdf.

should be granted, therefore, because *Basta* endangers the safety of millions of vulnerable Residents nationwide by eliminating State Ombudsman independence from State Agencies in contradiction to the OAA.[112]

B. *Basta* prevents AAAs from functioning as public advocates

The Petition should also be granted because *Basta* prevents AAAs from functioning as public advocates protecting the interests of 74 million vulnerable older adults nationwide from State Agency actions. *Basta* stops NIAAA from challenging decades of Department's alleged illegal conduct by justifying every action the Department took,[113] including *Basta* creating reasons not even argued by the Department[114] and forfeiting four

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[112] Combined Petition for Rehearing in Appellate Court and Petition for Certification of Appeal to the Illinois Supreme Court, 21-22.

[113] Combined Petition for Rehearing in Appellate Court and Petition for Certification of Appeal to the Illinois Supreme Court.

[114] The Department did not argue in their brief that the complaint was time barred but Basta used the time bar defense to dismiss a count of the complaint, *Northwestern Illinois Area Agency on Aging v. Basta*, 2022 IL App (2d) 210234, ¶46; and despite the Department never mentioning the *Foxcroft* rule anytime during the over two years of this litigation, *Basta* volunteered it for dismissing another count of the complaint. *Id*.

NIAAA arguments[115] for dubious reasons[116] while never applying forfeiture to the Department in upholding the Dismissal. *Basta* does this, unfortunately, by simply just ignoring that NIAAA is the OAA designated public advocate representing the interests of 2.3 million older adults in Illinois.

Just as with the State Ombudsman, there are no reported federal cases regarding AAAs' public advocate role so it is expected that *Basta* will be used as a precedent by at least some State Agencies nationwide to expand their power to avoid oversight from AAAs who already struggle with the difficult task of trying to protect older adults from billion-dollar State Agencies that provide significant funding to the AAAs. Under *Basta*, therefore, State Agencies nationwide can follow the example in Illinois by prioritizing the interests of the bureaucracy over older adults in implementing policies without fear of litigation from AAAs under the OAA. *Basta*, consequently, is a dangerous precedent that poses a danger to millions of vulnerable older adults nationwide relying on the 618 AAAs as public advocates to protect them from actions of State Agencies.

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[115] *Id.* at ¶35, 68, 84, 94.

[116] For example, despite NIAAA alleging in the trial court that "the right to challenge an invalid rule is a broad right because refusing to comply with the [Procedure Act] is a blatant abuse of power", C 1114, Basta contradicts this alleged fact by concluding "Plaintiff did not raise this [broad right] argument before in the trial court … thus it has been forfeited." *Basta*, 2022 IL App (2d) 210234 at ¶ 93.

Basta prevents NIAAA from functioning as the public advocate by: 1) Erroneously concluding that NIAAA lacks standing to challenge the Department's illegal conduct; and 2) Being unreceptive to a public advocate using litigation to hold a State Agency accountable.

1. *Basta* denies public advocate standing

The Petition should also be granted because *Basta* denies NIAAA the right to function as the public advocate as it concludes that NIAAA does not have standing under the OAA to challenge the Department's illegal conduct.[117] *Basta* disregards that NIAAA, as the public advocate, has the implied right "to bring suit to implement the public advocate's power" because it is the "responsibility of the public advocate to investigate abuses in government."[118] *Basta* also ignores that the Department's own regulation which specifically gives NIAAA standing:

> In performing its stated function of advocate for older persons, an area agency on aging *shall* … monitor, evaluate, and comment on all [Department] policies, programs … which affect older persons [emphasis added].[119]

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[117] *Basta*, 2022 IL App (2d) 210234 at ¶ 94.

[118] *Supra* note 8.

[119] 89 Ill. Admin. Code § 230.150(a)(1).

NIAAA 'evaluates and comments' on Department policies through the Rule Process which gives NIAAA the opportunity to submit remarks,[120] receive a public hearing,[121] and request an economic analysis regarding the proposed policy.[122]

Basta, nevertheless, states that NIAAA cannot bring a "claim for relief based on the rights" [123] of older adults because NIAAA is just a member of the 'general public' which does not have "standing to challenge a [Department] rule, based solely on his or her self-proclaimed interest in it."[124] Under *Basta*, therefore, AAAs as public advocates have no right to challenge the illegal conduct of State Agencies on behalf of older adults under the OAA which fundamentally alters the Aging Network to the detriment of older adults whose primary (an usually only) voice against bureaucracies is AAAs.

2. *Basta* unreceptive to public advocate challenging government misconduct

The Petition should also be granted because *Basta* denies NIAAA the right to function as the public advocate by: a) ignoring the Substantial

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[120] 5 ILCS 100/5-40(b)(5).

[121] Id.

[122] Id.

[123] Basta, 2022 IL App (2d) 210234 at ¶ 89.

[124] *Basta*, 2022 IL App (2d) 210234 at ¶ 94.

Justice Standard; and b) construing facts to favor the Department in a direct contradiction to the Fact Standard.

a. Basta ignores Substantial Justice

Basta denies NIAAA the right to function as the public advocate by ignoring Substantial Justice Standard/fairness as it is never mentioned. The Substantial Justice Standard requires the Dismissal be denied unless it does 'substantial justice between' NIAAA, a small non-profit public advocate representing the interest of 2.3 million vulnerable Illinois adults, and the Department, which is a billion-dollar state agency alleged to have engaged in decades of illegal conduct by using invalid policies to avoid accountability. The Substantial Justice Standard on these facts alone require that the Dismissal be reversed so the Department has to at least answer the Amended Complaint.

Basta, unfortunately, ignores any discussion of the Substantial Justice Standard/fairness and instead improperly focuses on 'technical obstacles'[125] such as dismissing Count III of the Complaint because *Basta* claimed NIAAA forgot a footnote.[126]

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[125] *Norman A. Koglin Associates v. Valenz Oro, Inc.,* 680 N.E.2d 283, 288 (Ill. 1997).

[126] "The trial court dismissed Count III [of the Complaint] with prejudice…[and] Plaintiff has forfeited review of this issue…[because] plaintiff's amended complaint did not refer to or adopt Count III of the prior pleading." *Basta, 2022 IL App (2d) 210234* at ¶35, 37. Despite "orders dismissing an action with prejudice…[being] a final judgment on the merits for the

Other examples of *Basta* focusing on technical minutiae in preventing the Amended Complaint to proceeding to a hearing on the merits include *Basta* sustaining the Dismissal for:

- Count I because "plaintiff makes conclusory allegations"[127] which is disputed[128] by NIAAA;

- Count II because "plaintiff has therefore forfeited its conclusory argument that the Manual made significant changes"[129] despite the Amended Complaint alleging specific significant changes made by the Manual (as discussed see below);[130]

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purposes of res judicata..." *Camper v. Burnside Constr. Co.*, 998 N.E.2d 1264 (Ill. App. 2013), *Basta*, nevertheless, refused to consider the improper dismissal of Count III because the Amended Complaint was missing a footnote referencing Count III.

[127] *Basta,* 2022 IL App (2d) 210234 at ¶ 51.

[128] NIAAA is challenging the entire Manual as being invalid and argues that "just because the Defendant chose to bundle hundreds of pages of illegal policies into one document does not mean that challenging the entire Manual is somehow vague." A 183 (Response to Defendant's Motion to Dismiss).

[129] *Basta,* 2022 IL App (2d) 210234 at ¶ 68.

[130] C 582 – 83 (First Amended Complaint).

- Count III because the Tracking Email is a standardized form[131] which is disputed in an affidavit[132] by NIAAA;

- Count IV because the Conflicts Inquiry is a standardized form[133] which is disputed in an affidavit[134] by NIAAA; and

- Counts V and VI because NIAAA, despite managing the programs in question (as discussed below), did not suffer a significant enough injury to challenge the Department for implementing illegal rules to administer those programs.[135]

Basta, therefore, is not about fairness but rather *Basta* condoning the Department's illegal conduct at the expense of older adults that will continue for decades in the future because the Substantial Justice Standard does not allow Illinois AAAs as public advocates to hold the Department accountable through litigation.

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[131] *Basta,* 2022 IL App (2d) 210234 at ¶ 74.

[132] A 180 (Response to Defendant's Motion to Dismiss First Amended Complaint).

[133] *Basta,* 2022 IL App (2d) 210234 at ¶ 85.

[134] C 1121 (Response to Defendant's Motion to Dismiss First Amended Complaint).

[135] *Basta*, 2022 IL App (2d) 210234 at ¶ 92-93.

b. *Basta* violates the Fact Standard

The Petition should also be granted because *Basta* denies NIAAA the right to function as the public advocate by blatantly violating the Fact Standard in construing facts to favor the Department throughout the opinion in upholding the Dismissal.[136] For example, despite NIAAA alleging that it:

- Oversees the Community Care Program (CCP) and the Adult Protective Services (APS) Programs;[137]

- Is integral to CCP operations;[138]

- Is referenced as an AAA 90 times in the CCP regulations;[139]

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[136] NIAAA's 'Combined Petition for Rehearing in Appellate Court and Petition for Certification of Appeal to the Illinois Supreme Court' documents nine pages of *Basta* violating the Fact Standard in sustaining the Dismissal.

[137] C 580 (First Amended Complaint).

[138] C 1115 (Response to Defendant's Motion to Dismiss First Amended Complaint).

[139] C 1115 (Response to Defendant's Motion to Dismiss First Amended Complaint).

- Is responsible by state statute for managing the APS Program;[140]

- Could be held liable if someone is injured in the CCP and APS Programs because of the CCP/ROS Rules;[141] and

- Could be terminated from the CCP/APS programs by the Department if NIAAA is not enforcing the CCP/ROS Rules to the Department's satisfaction.[142]

Basta repeatedly contradicts these alleged facts by concluding:

- "Nowhere in its complaint does plaintiff allege that it had sustained a direct injury as a result of the enforcement of the Medicaid Policy or that it was in imminent danger of sustaining such an injury. Additionally, plaintiff did not allege that the Medicaid Policy requires anything of it …."[143];

- "Nowhere in its complaint does plaintiff allege that it had sustained a direct injury as a result

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[140] C 1115 (Response to Defendant's Motion to Dismiss First Amended Complaint).

[141] Appellant Brief, 25.

[142] Appellant Brief, 2.

[143] *Basta*, 2022 IL App (2d) 210234 at ¶ 91

of the enforcement of the ROS Memorandum or that it was in imminent danger of sustaining such an injury. Additionally, plaintiff did not allege that the ROS Memorandum requires anything of it ...."[144];

- "The Medicaid Policy is directed to CCUs, not plaintiff or any other AAA"[145];

- "Plaintiff did not allege that the Medicaid Policy requires anything of it";[146]

- "Nowhere in its complaint does plaintiff allege that it had sustained a direct injury as a result of the enforcement of the ROS Memorandum or that it was in imminent danger of sustaining an injury.";[147] and

- "Plaintiff cites no authority stating that an entity's general oversight of a government program is sufficient to confer standing."[148]

Despite the Department not having even answered the Amended Complaint or having produced any

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[144] *Id.* at ¶ 92

[145] *Id.* at ¶ 91

[146] *Id.* at ¶ 91

[147] *Id.* at ¶ 92

[148] *Id.* at ¶ 93.

evidence on NIAAA's injury, *Basta* engages in rampant speculation to favor the Department in violation of the Fact Standard in concluding that NIAA has not suffered sufficient injury from the Department's illegal policies to warrant standing.

As another example, Count III of the Complaint specifically alleges that the Transparency Policy is in the Manual.[149] When the Department filed an affidavit disputing this alleged fact, NIAAA filed a counter-affidavit providing three pages of sworn testimony detailing the circumstances about how the Transparency Policy was implemented and added to the Manual.[150] *Basta,* nevertheless, concluded that:

> By presenting adequate evidence that the Transparency Policy was never implemented or made part of the Manual, defendant satisfied the initial burden of going forward with the motion to dismiss … [and] plaintiff did not produce … any other evidence … [so] the evidentiary facts [alleged by the defendant] in the motion to dismiss were deemed admitted" by plaintiff.[151]

In other words, *Basta* in dismissing Count III construed everything the Department claimed about the Transparency Policy as being true while ignoring pages of NIAAA's sworn testimony to the contrary

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[149] C 6 (Complaint).

[150] Motion for Sanctions, Affidavit.

[151] Basta, 2022 IL App (2d) 210234 at ¶ 40.

which is another blatant violation of the Fact Standard.

As a final example, NIAAA alleged that the Monitoring Rule is adding new policies not required by federal law, as it requires AAAs to:

- Develop and use systematic procedures and an instrument for conducting subgrantee and subcontractor evaluations;
- Issue a written report to subgrantees of any findings;
- Maintain written documentation of grantee monitoring;
- Develop and implement a work plan to ensure subgrantee performance;
- Comply with Department risk assessments, evaluations, on-site evaluations, monitoring, and special reviews of AAAs; and
- Perform these duties every area plan cycle.[152]

Basta, nevertheless, contradicts these alleged facts by concluding that the "plaintiff does not indicate what those changes are or explain how the Manual's language alters any existing federal and state

[152] C 582 – 83 (First Amended Complaint).

monitoring rules. Plaintiff has forfeited its conclusory argument."[153]

Basta, therefore, treated all of NIAAA's factual allegations with outright skepticism while accepting every statement of the Department as being irrefutable in contradiction to the Fact Standard. *Basta*, consequently, gives the Department unfettered authority to implement policies without oversight and without regard to how the policies injure older adults. This means, for example, that under *Basta* the Department could eliminate the home delivered meal program in Illinois to save money by simply sending an email to the AAAs and the AAAs would be powerless to stop the Department regardless of the injury it causes to older adults.

Basta repeatedly and blatantly contradicting the Fact Standard, unfortunately, sends a clear message to all Illinois AAAs that any challenge to the Department will not even survive a motion to dismiss in Illinois courts. *Basta* demonstrating such open enmity to a public advocate challenging the illegal conduct of a State Agency also sends a clear message to State Agencies nationwide that AAAs are unlikely to be successful holding State Agencies accountable through litigation. The Petition should be granted, therefore, as *Basta* creates potential dire national implications for the Aging Network in denying NIAAA standing and being openly hostile to a public advocate challenging decades of illegal Department conduct.

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[153] *Basta*, 2022 IL App (2d) 210234 at ¶ 68.

C. Conclusion

The Petition should be granted, therefore, because *Basta* endangers vulnerable adults by eliminating the ability of the State Ombudsman to function as an independent advocate for Residents and the ability of the AAAs to function as public advocates protecting older adults from governmental actions.

Respectfully submitted,

/s/ Grant Nyhammer

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NO: _____

IN THE
UNITED STATES SUPREME COURT

Northwestern Illinois Area Agency on Aging

Petitioner,

v.

Paula Basta, in her capacity as Director of the Illinois Department on Aging

Respondent.

On Petition for Writ of Certiorari
to the Illinois Supreme Court

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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2022 IL App (2d) 210234
No. 2-21-0234
Opinion Filed June 29, 2022

IN THE APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

Appeal from the Circuit Court of Winnebago County
No. 20-MR-38
Honorable Lisa Renae Fabiano
Judge, Presiding

NORTHWESTERN ILLINOIS AREA AGENCY ON AGING,
Plaintiff-Appellant,

v.

PAULA BASTA, in Her Official Capacity as Director of Aging,
Defendant-Appellee

JUSTICE HUDSON delivered the judgment of the court, with opinion.

Presiding Justice Bridges and Justice Hutchinson concurred in the judgment and opinion.

OPINION

¶ 1 Plaintiff, the Northwestern Illinois Area Agency on Aging, filed in the circuit court of Winnebago County a three-count complaint against defendant, Paula Basta, in her capacity as the director of the Department on Aging (Department). In the complaint, plaintiff alleged that the Department had enacted administrative rules that were not adopted pursuant to the procedure mandated by the Illinois Administrative Procedure Act (Act) (5 ILCS 100/1-1 *et seq.* (West 2020)). Plaintiff sought the entry of an order stating that the rules were invalid. Defendant filed a motion to dismiss plaintiff's complaint, pursuant to section 2-619.1 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619.1 (West 2020)), alleging that the matters complained of were untimely raised or exempt from the Act's rulemaking provisions (see 735 ILCS 5/2-615, 2-619(a)(5), (a)(9) (West 2020)). Following a hearing, the trial court dismissed counts I and II of the complaint without prejudice, dismissed count III with prejudice, and granted plaintiff leave to file an amended complaint.

¶ 2 Plaintiff subsequently filed a six-count, first amended complaint. Plaintiff again alleged that the Department had enacted various administrative rules that were not adopted pursuant to the procedure mandated by the Act and again sought entry of an order stating that the rules were invalid. Defendant again responded with a motion to dismiss pursuant to section 2-619.1 of the Code (735 ILCS 5/2-619.1 (West 2020)). Defendant alleged that the matters raised in the first amended complaint

were untimely, were exempt from the Act's rulemaking provisions, or were not rules at all, and she alleged that plaintiff lacked standing to raise certain claims (735 ILCS 5/2- 615, 2-619(a)(5), (a)(9) (West 2020)). The trial court dismissed with prejudice counts I through IV of the first amended complaint, pursuant to section 2-615 of the Code (735 ILCS 5/2-615 (West 2020)). The trial court dismissed with prejudice counts V and VI, pursuant to section 2-619 of the Code (735 ILCS 5/2-619 (West 2020)). Thereafter, plaintiff filed a notice of appeal challenging the dismissal of count III of its original complaint and the dismissal of all six counts of its first amended complaint. For the reasons set forth below, we affirm.

¶ 3 I. BACKGROUND

¶ 4 A. The Parties

¶ 5 Defendant is the current director of the Department. The Department administers programs for senior citizens in Illinois, including receiving and disbursing federal funds made available to it under the legislation originally enacted as the Older Americans Act of 1965, now codified as amended at 42 U.S.C. § 3001 *et seq.* (Older Americans Act). See 42 U.S.C. § 3025(a)(1) (2018)(requiring states to designate an agency to receive Older Americans Act funds); 20 ILCS 105/4 (West 2020) (providing that the Department "shall be the single State agency for receiving and disbursing federal funds made available under the 'Older Americans Act.' "). In implementing the Older Americans Act, the Department designates public and private nonprofit

organizations throughout Illinois as "area agenc[ies] on aging" (AAAs), each of which provides services to senior citizens within a specific geographic area. 42 U.S.C. § 3025(a)(2)(A) (2018); 20 ILCS 105/3.07, 3.08 (West 2020). Under the Older Americans Act, the United States Department of Health and Human Services (HHS) distributes federal funds to the Department, which then distributes those funds to the AAAs. 42 U.S.C. § 3025(a) (2018); 20 ILCS 105/3.07, 3.08, 4 (West 2020). In turn, AAAs "make subgrants or contracts to service providers" that offer various services to older adults. 45 C.F.R. § 1321.1(c) (2020). Plaintiff, a private nonprofit entity, is the AAA for Area 1, which comprises the counties of Jo Daviess, Stephenson, Winnebago, Boone, Carroll, Ogle, De Kalb, Whiteside, and Lee. 20 ILCS 105/3.08 (West 2020).

¶ 6 The Department may also disburse Older Americans Act funds for the State Long-Term Care Ombudsman program, which is designed to investigate and act on complaints regarding long-term care facilities. 42 U.S.C. §§ 3030d(a)(10), 3058g(a)(3) (2018); 45 C.F.R. § 1321.63(a)(5) (2020); 20 ILCS 105/4.04 (West 2020). Although the Department appoints the State Long-Term Care Ombudsman (Ombudsman) and operates the Ombudsman's office, that office is separate from the Department's other divisions. 42 U.S.C. § 3058g(a)(1)(A) (2018); 45 C.F.R.

§ 1324.11(b)(1) (2020); 89 Ill. Adm. Code 270.134 (2019).

¶ 7 B. The Illinois Administrative Procedure Act

¶ 8 The Act sets forth the requirements for the

promulgation of rules by administrative agencies. 5 ILCS 100/1-1 *et seq*. (West 2020). The Act applies to the Department. 20 ILCS 105/5.02 (West 2020) (stating that the provisions of the Act "are hereby expressly adopted and shall apply to all administrative rules and procedures of the Department [on Aging]"). The Act defines a "rule" as an "agency statement of general applicability that implements, applies, interprets, or prescribes law or policy." 5 ILCS 100/1-70 (West 2020). However, the term does not include "statements concerning only the internal management of an agency and not affecting private rights or procedures available to persons or entities outside the agency," "informal advisory rulings," "intra-agency memoranda," or "the prescription of standardized forms." 5 ILCS 100/1- 70 (West 2020). Moreover, while the Act requires administrative agencies to comply with its rulemaking provisions "[b]efore the adoption, amendment, or repeal of any rule" (5 ILCS 100/5-35(a) (West 2020)), the Act's rulemaking provisions do not apply to (1) "a matter relating solely to agency management or personnel practices or to public property, loans, or contracts" (5 ILCS 100/5-35(c) (West 2020)) or (2) "the adoption of any rule required by federal law in connection with which the Department is precluded by law from exercising any discretion" (20 ILCS 105/5.02(West 2020)).

¶ 9 Administrative rulemaking under the Act involves a three-step process. See *Department of Revenue v. Civil Service Comm'n*, 357 Ill. App. 3d 352, 356-57 (2005); *Weyland v. Manning*, 309 Ill. App. 3d 542, 543-44 (2000). The first step, known as the first notice period, gives notice of the proposed rule in the Illinois Register. 5 ILCS 100/5-40(b) (West 2020); *Weyland*, 309 Ill. App. 3d at 543. The

public has 45 days from the date the notice is published in which to comment. 5 ILCS 100/5-40(b) (West 2020); *Weyland*, 309 Ill. App. 3d at 543. If during the first 14 days of the first notice period the agency proposing the rule receives a request for a public hearing from 25 interested persons, an association representing at least 100 interested persons, the Governor, the Joint Committee on Administrative Rules (JCAR), or a unit of local government that may be affected, the agency is required to hold a public hearing. 5 ILCS 100/5-40(b) (West 2020); *Weyland*, 309 Ill. App. 3d at 543.

¶ 10 At the end of the first notice period begins the second notice period, during which the agency must submit certain information to JCAR in a document called a second notice. 5 ILCS 100/5-40(c) (West 2020); 1 Ill. Adm. Code 220.600 (1994); *Weyland*, 309 Ill. App. 3d at 544. JCAR is a bipartisan, bicameral legislative-support-services agency that reviews proposed and existing rules as well as agencies' compliance with the rulemaking procedure. 5 ILCS 100/5-90 (West 2020); 25 ILCS 130/1-5, 2-1 (West 2020); *Department of Revenue*, 357 Ill. App. 3d at 356; *Weyland*, 309 Ill. App. 3d at 544. The second notice period is also known as the legislative review period. *Department of Revenue*, 357 Ill. App. 3d at 356; *Weyland*, 309 Ill. App. 3d at 544 (citing Robert John Kane, *Specific Rulemaking Procedures in Illinois*, in Illinois Administrative Law § 5.19 (Ill. Inst. for Cont. Legal Educ. 1991)). During this time, JCAR reviews the second notice submitted by the agency. 1 Ill. Adm. Code 220.600 (1994); *Weyland*, 309 Ill. App. 3d at 544. The Illinois Administrative Code sets forth certain

requirements that a second notice must meet for JCAR to accept it. 1 Ill. Adm. Code 220.600 (1994); *Weyland*, 309 Ill. App. 3d at 544. If the second notice is not satisfactory, JCAR may reject it. 1 Ill. Adm. Code 220.600 (1994); *Weyland*, 309 Ill. App. 3d at 544. After reviewing the second notice, JCAR may submit questions to the agency. 1 Ill. Adm. Code 220.700(b) (1994); *Weyland*, 309 Ill. App. 3d at 544. Upon completion of its review, JCAR will file either a certification of no objection, a statement of recommendation that the agency pursue some further action, a statement of objection to the proposed rule, or a statement prohibiting the filing of the proposed rule. 5 ILCS 100/5-40(c) (West 2020); 1 Ill. Adm. Code 220.1000 (1994); *Weyland*, 309 Ill. App. 3d at 544.

¶ 11 The third and final step is adoption of the rule. *Department of Revenue*, 357 Ill. App. 3d at 356-57; *Weyland*, 309 Ill. App. 3d at 544. An agency may file a proposed rule for adoption after

(1) the second notice period has expired, (2) the agency has received a certification of no objection from JCAR, or (3) the agency has responded to a statement of objection from JCAR. 5 ILCS 100/5-40(d) (West 2020); 1 Ill. Adm. Code 220.1100 (1994); *Weyland*, 309 Ill. App. 3d at 544. A proceeding to contest any rule on the ground of noncompliance with the procedural requirements of the Act's rulemaking provisions "must be commenced within 2 years from the effective date of the rule." 5 ILCS 100/5-35(b) (West 2020); *Filliung v. Adams*, 387 Ill. App. 3d 40, 53 (2008).

¶ 12 C. Plaintiff's Original Complaint

¶ 13 On January 16, 2020, plaintiff filed a three-count complaint against defendant. The complaint alleged that defendant "is using invalid rules to regulate the conduct of [plaintiff] and [plaintiff's] grantees." Specifically, count I alleged that the Department's "Area Agencies on Aging Policies and Procedures Manual" (Manual), which comprises 12 sections and approximately 400 pages, is invalid because it was not adopted pursuant to the Act's rulemaking provisions (5 ILCS 100/art. 5 (West 2020)). Similarly, counts II and III alleged that section 1000 of the Manual, titled "Evaluation, Monitoring and Special Reviews" (Monitoring Policy), and the Department's "Area Agency on Aging Meetings Transparency Policy" (Transparency Policy), respectively, are invalid rules because they were not adopted pursuant to the Act's rulemaking provisions. The Monitoring Policy "describes the purpose, approach and procedures for conducting risk assessments, evaluations, monitoring activities and special reviews of the [AAAs] and the [AAAs'] evaluation of subgrantees and subcontractors." The Transparency Policy provides that all board and advisory council meetings of AAAs "shall be held in a transparent manner in facilities which are readily accessible and large enough to accommodate the public and applicable Department personnel," and it requires that the meetings comply with certain provisions enumerated therein. Plaintiff requested an order stating that the entire Manual is invalid, the Monitoring Policy is invalid, and the Transparency Policy is invalid. Plaintiff attached to its complaint copies of the Monitoring Policy and the Transparency Policy. Other than the Monitoring Policy, no other

portions of the Manual were appended to the complaint.

¶ 14 On April 2, 2020, defendant filed a motion to dismiss plaintiff's complaint, pursuant to section 2-619.1 of the Code (735 ILCS 5/2-619.1 (West 2020) (allowing motions with respect to pleadings under section 2-615 of the Code (735 ILCS 5/2-615 (West 2020)) and motions for involuntary dismissal or other relief under section 2-619 of the Code (735 ILCS 5/2-619 (West 2020)) to be filed together as a single motion)). Defendant argued that count I of the complaint should be dismissed as untimely, pursuant to section 2-619(a)(5) of the Code (735 ILCS 5/2- 619(a)(5) (West 2020)), because all but certain portions of the Monitoring Policy became effective more than two years prior to the filing of the complaint. See 5 ILCS 100/5-35(b) (West 2020) (providing that any "proceeding to contest any rule on the ground of non-compliance with the procedural requirements of [the Act] must be commenced within 2 years from the effective date of the rule"). Defendant also contended that, under section 2-619(a)(9) of the Code (735 ILCS 5/2-619(a)(9) (West 2020)), count I should be dismissed with regard to section 900 of the Manual, pursuant to the Act's contract exception, because section 900 is explicitly incorporated in a 2018 grant agreement between plaintiff and the Department. See 5 ILCS 100/5-35(c) (West 2020) (providing that the Act's rulemaking provisions "do not apply to a matter relating solely to agency management or personnel practices or to public property, loans, or contracts"). Defendant argued that count II should be partially dismissed as untimely, pursuant to section 2-

619(a)(5) of the Code (735 ILCS 5/2-619(a)(5) (West 2020)), because only certain portions of the Monitoring Policy took effect within two years prior to the filing of plaintiff's complaint. See 5 ILCS 100/5-35 (West 2020). Defendant argued that count III should be dismissed pursuant to section 2-619(a)(9) of the Code (735 ILCS 5/2-619(a)(9) (West 2020)), because the Transparency Policy is not part of the Manual and is not a policy or rule of the Department.

¶ 15 Defendant also argued that counts I and II of the complaint should be dismissed pursuant to section 2-615 of the Code (735 ILCS 5/2-615 (West 2020)). With respect to count I, defendant argued that plaintiff's blanket allegation that the entire Manual is a rule is conclusory and not supported by any specific allegations or exhibits. Moreover, citing the Act's definition of "rule" (5 ILCS 100/1-70 (West 2020)) and section 5.02 of the Illinois Act on the Aging (20 ILCS 105/5.02 (West 2020) (providing that the Act does not apply to the Department with respect to the adoption of "any rule required by federal law in connection with which the Department is precluded by law from exercising any discretion")), defendant contended that the Manual was not subject to the Act's rulemaking provisions because it "simply provides a synthesized restatement of the requirements of statutes and regulations for the benefit of the Department and the AAAs." Similarly, with respect to count II, defendant argued that the Monitoring Policy does not fall within the Act's definition of a "rule" because it merely "summarizes the legal requirements of other statutes and regulations and directs the

Department on how to carry out its obligations under thoselaws." See 5 ILCS 100/1-70 (West 2020).

¶ 16 Attached to defendant's motion to dismiss were various documents, including the entire Manual and a "verification" from Jose Jimenez, a supervisor with the Department. See 735 ILCS 5/1-109 (West 2020) (providing for "[v]erification by certification"). In the verification, Jimenez stated that the Department does not have a transparency policy. He explained that in 2018 the Department proposed the Transparency Policy at issue as an addition to the Manual. However, the Transparency Policy "was never implemented or added to the *** Manual" and "is not an official policy of the Department." Jimenez further stated that the Department does not require AAAs to comply with the requirements of the Transparency Policy.

¶ 17 On July 28, 2020, the trial court held a hearing on defendant's motion to dismiss. Following the hearing, the court dismissed counts I and II without prejudice, based on the Act's limitations period. The court offered plaintiff the opportunity to replead any challenges to portions of the Manual published "within the statute of limitations" and directed plaintiff's counsel to "parse out" exactly which provisions of the Manual it was challenging in any amended complaint. With respect to count III, the court acknowledged that defendant "contest[ed] the facts," but it allowed that "on a 2-619 motion you can contest easily proven facts by way of affidavit." The court dismissed count III with prejudice because the Department showed that the Transparency Policy never took effect and plaintiff did not offer a "counter

affidavit to suggest that [the Department is] requiring people to follow the Transparency Policy." On July 30, 2020, the trial court entered a written order in accordance with its oral pronouncements.

¶ 18 D. Plaintiff's First Amended Complaint

¶ 19 Plaintiff subsequently filed a motion for leave to file an amended complaint, which the trial court granted. To that end, on August 12, 2020, plaintiff filed a six-count, first amended complaint. The amended complaint alleged that six different "rules" enacted by the Department were invalid "because they have not been adopted pursuant to the *** Act." Plaintiff therefore concluded that the policies were invalid. Counts I and II pertained to the entire Manual and the Monitoring Policy (section 1000 of the Manual), respectively. Count III pertained to an e-mail issued by the Department on August 5, 2020, in response to the COVID-19 pandemic (Tracking E-mail). The Tracking E-mail required AAAs to track and report certain information about senior centers, on a spreadsheet provided by the Department, including (1) planning and service area, (2) county, (3) physical site name, (4) physical site address, (5) phone number, (6) operating hours, (7) date reopened after closures mandated by the response, (8) date reclosed due to COVID-19 (if applicable), and (9) subsequent reopening date (if applicable). Count IV related to a July 2020 memorandum from the Ombudsman, requiring each AAA to complete an "Organizational Conflict of Interest Form" on an annual basis (Conflict-of-Interest Form). Count V pertained to a July 2019 document titled "Mandatory Medicaid Application

and Redetermination for Community Care Program Participants" (Medicaid Policy). The Medicaid Policy explained that participants in the Community Care Program were "no longer *** exempt from applying for Medicaid," so Care Coordination Units (CCUs) should verify whether a participant was receiving Medicaid benefits or had applied for them. The Medicaid Policy also described the procedures for determining a participant's eligibility. Finally, count VI pertained to a July 2020 memorandum from the Department's Office of Adult Protective Services regarding a "Report of Substantiation [(ROS)] Policy Clarification" (ROS Memorandum). The ROS Memorandum asked the State's Adult Protective Services provider agencies, in preparing final investigative reports of abuse, neglect, exploitation, or self-neglect, to confirm what "organization *** is providing care coordination services" to the alleged victim. The ROS Memorandum added that the ROS "should be sent to the organization coordinating care for the individual at the time of substantiation" and that "it is the responsibility of the [Adult Protective Services] provider to attempt to share the ROS with the care coordination agency that is actively involved with the individual." Plaintiff attached to its first amended complaint the Monitoring Policy, the Tracking E-mail (but not the spreadsheet), the Conflict-of-Interest Form and memorandum, the Medicaid Policy, and the ROS Memorandum. Other than the Monitoring Policy, no other provisions of the Manual were appended to the first amended complaint.

¶ 20 On September 23, 2020, defendant filed a

combined motion to dismiss plaintiff's first amended complaint, under section 2-619.1 of the Code (735 ILCS 5/2-619.1 (West 2020)). Pursuant to section 2-619(a)(9) of the Code (735 ILCS 5/2-619(a)(9) (West 2020)), defendant argued, the entire complaint should be dismissed because the Act's contracts and agency- management exceptions apply. See 5 ILCS 100/5-35(c) (West 2020) (providing that "[t]he rulemaking procedures *** do not apply to a matter relating solely to agency management or personnel practices or to public property, loans, or contracts"). Defendant further argued that, pursuant to section 2-619(a)(5) of the Code (735 ILCS 5/2-619(a)(5) (West 2020)), counts I and II of the complaint should be partially dismissed as time-barred. See 5 ILCS 100/5-35(b) (West 2020) (providing that any "proceeding to contest any rule on the ground of noncompliance with the procedural requirements of this [Act] must be commenced within 2 years from the effective date of the rule"). Defendant next argued that counts V and VI should be dismissed pursuant to section 2-619 of the Code (735 ILCS 5/2-619 (West 2020)), based on a lack of standing. Specifically, defendant argued that neither the Medicaid Policy nor the ROS Memorandum applied to plaintiff. Defendant explained that the Medicaid Policy is directed at CCUs and it affects the CCUs and the Community Care Program participants. The ROS Memorandum is directed at Adult Protective Service provider agencies. Since neither policy is directed at AAAs, defendant maintained, plaintiff had no standing to challenge those policies.

¶ 21 Pursuant to section 2-615 of the Code (735

ILCS 5/2-615 (West 2020)), defendant argued that count I failed to state a claim for declaratory relief because it identified no specific provisions of the Manual that constituted rulemaking and the Department had the general authority to publish a manual summarizing the laws it administers. As for counts II, III, IV, and VI, defendant argued that each of the forms, correspondence, and publications challenged were either prescriptions of standardized forms or descriptions of Department or AAA duties under federal or state law, not new rules that were required to undergo notice-and-comment rulemaking. See 5 ILCS 100/1-70 (West 2020) (excluding from the definition of a "rule" "statements concerning only the internal management of an agency and not affecting private rights or procedures available to persons or entities outside the agency," "informal advisory rulings," "intra-agency memoranda," and "the prescription of standardized forms"); 20 ILCS 105/5.02 (West 2020) ("Section 5-35 of the [Act] relating to procedures for rule-making does not apply to the adoption of any rule required by federal law in connection with which the Department is precluded by law from exercising any discretion"). Defendant attached various documents to her motion to dismiss, including a completecopy of the Manual.

¶ 22 In its response to defendant's motion to dismiss, plaintiff argued that it had standing to pursue counts V and VI because, *inter alia*, (1) the Act does not have an explicit standing requirement, (2) plaintiff has "special legal status" as an advocate that authorizes it to "bring litigation on behalf of older adults for the Department's illegal conduct,"

and (3) it contracts with the Department to manage the programs at issue. With respect to defendant's statute of limitations defense, plaintiff argued that a rule that did not go through the Act's rulemaking procedure had no effective date and, thus, could be challenged at any time. Plaintiff also argued that there were questions of fact surrounding the effective dates of the Manual's various sections, attaching an affidavit from its executive director stating that he was "disputing the effective dates for policies contained in the Manual," because there was no evidence of when or how the Manual was published. In response to the section 2-615 motion, plaintiff argued that the Department's various actions affected outside organizations and "any Department statement that affects outside organizations must be approved through" the Act's rulemaking provisions. As for the exception for rules required by federal law, plaintiff argued that the Department exercised discretion in publishing the Monitoring Policy, because that section did not recite the text of the federal monitoring requirements verbatim. Plaintiff attached a copy of the Tracking E-mail spreadsheet toits response.

¶ 23 While defendant's motion to dismiss the first amended complaint was pending, plaintiff filed a motion to add Kelly Richards, the Ombudsman, as a defendant to its action because she had sent an e-mail reminding plaintiff to complete the Conflict-of-Interest Form. Citing sections 2-405 and 2-406 of the Code (735 ILCS 5/2-405, 2-406 (West 2020)), plaintiff argued that the Ombudsman was a necessary party because she was "threatening sanctions" against plaintiff for not completing the

Conflict-of-Interest Form. Plaintiff further asserted that defendant could not represent the Ombudsman because the Department's interests were adverse to hers. On October 14, 2020, the trial court held a hearing on plaintiff's motion and denied it.

¶ 24 In a memorandum opinion and order dated April 7, 2021 (but incorrectly file stamped April 8, 2020), the trial court granted defendant's motion to dismiss plaintiff's first amended complaint. The court agreed that plaintiff lacked standing to bring counts V and VI, because those counts challenged policies that applied only to CCUs and Adult Protective Service providers. The court rejected plaintiff's claim that it had standing because the Act does not have an explicit standing requirement, explaining that the fact that a statute does not expressly address standing does not mean that the standing doctrine is inapplicable. The court also rejected plaintiff's claim that it had standing via its status as an advocate for older adults, noting that the statutes and rules giving plaintiff such status say nothing about its standing to file lawsuits challenging rules that did not apply to it. Finally, the court determined that the fact that plaintiff manages the programs at issue does not make it subject to the directives. The court explained that plaintiff is not the entity that must comply with the directives and plaintiff has not alleged any action that it must undertake to comply with the directives, nor has it alleged any harm that it would suffer if it did not abide by the directives. Therefore, the court dismissed counts V and VI with prejudice pursuant to section 2-619 of the Code (735 ILCS 5/2-619 (West 2020)).

¶ 25 As for counts I through IV, the court granted defendant's section 2-615 motion (see 735 ILCS 5/2-615 (West 2020)) and dismissed those counts with prejudice, concluding that none of the challenged actions of the Department required rulemaking. The court first noted that, in count I, plaintiff identified no specific provisions of the Manual that rose to the level of a rule under the Act. The court rejected plaintiff's claim that the "entire [M]anual" had to go through notice-and- comment rulemaking, because, rather than implementing new policies, it summarized existing laws. As for count II, the court held that the challenged portions of the Monitoring Policy simply summarized existing federal and state rules governing the Department's and plaintiff's monitoring responsibilities. With respect to count III, the court concluded that compliance with the Tracking E-mail constituted "a minor administrative task" that was "well within the scope of an AAA's duties" to monitor the programs in its service area. Finally, the court dismissed count IV, concluding that the Ombudsman's request that plaintiff complete the Conflict-of-Interest Form was not a rule, because federal and state law required the Ombudsman to identify and remedy conflicts of interest.

¶ 26 Plaintiff subsequently filed a notice of appeal (which it later amended) from (1) the trial court's April 7, 2021, memorandum opinion and order, which dismissed with prejudice counts I through VI of its first amended complaint, (2) the trial court's July 30, 2020, order dismissing with prejudice count III of plaintiff 's original complaint, and (3) the "[o]rders taken from the Report of Proceedings

before the [trial court] on July 28, 2020."

¶ 27 II. ANALYSIS

¶ 28 On appeal, plaintiff argues that the trial court improperly dismissed with prejudice count III of its original complaint as well as all six counts in its first amended complaint. In general, plaintiff asserts that the trial court "improperly construed facts against [it] and made mistakes of law." Prior to discussing these contentions, we address the appropriate standard of review.

¶ 29 A. Standard of Review

¶ 30 Defendant moved to dismiss plaintiff's complaints pursuant to section 2-619.1 of the Code (735 ILCS 5/2-619.1 (West 2020)). Section 2-619.1 provides that motions with respect to pleadings pursuant to sections 2-615 and 2-619 of the Code (735 ILCS 5/2-615, 2-619 (West 2020)) may be filed together as a single motion. 735 ILCS 5/2-619.1 (West 2020); *Edelman, Combs & Latturner v. Hinshaw & Culbertson*, 338 Ill. App. 3d 156, 164 (2003).

¶ 31 A section 2-615 motion to dismiss challenges the legal sufficiency of a complaint based on defects apparent on its face. 735 ILCS 5/2-615 (West 2020); *Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 429 (2006); *Collins v. Bartlett Park District*, 2013 IL App (2d) 130006, ¶ 26. In ruling on a section 2-615 motion to dismiss, all well-pleaded facts and all reasonable inferences that may be drawn from those facts are

accepted as true. *Rockford Memorial Hospital v. Havrilesko*, 368 Ill. App. 3d 115, 120 (2006). However, a plaintiff may not rely on mere conclusions of law or fact unsupported by specific factual allegations. *Pooh-Bah Enterprises, Inc. v. County of Cook*, 232 Ill. 2d 463, 473 (2009). The critical inquiry is whether the allegations of the complaint are sufficient to establish a cause of action under which relief may be granted. *Malinksi v. Grayslake Community High School District 127*, 2014 IL App (2d) 130685, ¶ 6. Thus, only those facts apparent from the face of the pleadings, documents attached to a complaint (including exhibits, depositions, and affidavits), matters of which the court can take judicial notice, and judicial admissions in the record may be considered in ruling on a section 2-615 motion. *Bruss v. Przybylo*, 385 Ill. App. 3d 399, 405 (2008); *Brock v. Anderson Road Ass'n*, 287 Ill. App. 3d 16, 21 (1997). A court may also consider documents attached to a motion to dismiss where the plaintiff put their contents at issue but failed to attach them to the complaint. See *Perkaus v. Chicago Catholic High School Athletic League*, 140 Ill. App. 3d 127, 134 (1986). Where allegations made in the body of the complaint conflict with facts disclosed in the exhibits, the exhibits control and the allegations will not be taken as true in evaluating the sufficiency of the complaint. *Bajwa v. Metropolitan Life Insurance Co.*, 208 Ill. 2d 414, 430-31 (2004).

¶ 32 In contrast, a motion to dismiss based on section 2-619 of the Code (735 ILCS 5/2-619 (West 2020)) admits the legal sufficiency of the complaint but raises defects, defenses, or other affirmative

matter, appearing on the face of the complaint or established by external submissions, that defeat the claim. *Orlak v. Loyola University Health System*, 228 Ill. 2d 1, 6-7 (2007); *Jaros v. Village of Downers Grove*, 2020 IL App (2d) 180654, ¶ 35; *Malinksi*, 2014 IL App (2d) 130685,¶ 6. An "affirmative matter" for the purposes of a section 2-619 motion is something in the nature of a defense that negates the cause of action completely or refutes crucial conclusions of law or conclusions of material fact contained in or inferred from the complaint. *Cwikla v. Sheir*, 345 Ill. App. 3d 23, 29 (2003). The purpose of section 2-619 is to afford litigants a means to dispose of issues of law and easily proven issues of fact at the outset of litigation. *Brummel v. Grossman*, 2018 IL App (1st) 162540, ¶ 22.

¶ 33 In considering a combined motion to dismiss pursuant to section 2-619.1, we accept all well-pleaded facts in the complaint as true, drawing all reasonable inferences from these facts in favor of the nonmoving party. *Marshall*, 222 Ill. 2d at 429; *Malinksi*, 2014 IL App (2d) 130685, ¶ 6. Our review under either section 2-615 or section 2-619 of the Code is *de novo*. *Hadley v. Doe*, 2015 IL 118000, ¶ 29; *Malinksi*, 2014 IL App (2d) 130685, ¶ 6. Further, we may affirm the trial court's judgment on any basis in the record, regardless of the court's reasoning. *O'Callaghan v. Satherlie*, 2015 IL App (1st) 142152, ¶ 17.

¶ 34 B. The Original Complaint

¶ 35 We first address plaintiff's challenge to the dismissal of count III of plaintiff's original

complaint. That count alleged that the Transparency Policy is an invalid administrative rule under the Act. As noted earlier, the trial court dismissed count III with prejudice, concluding that the Department showed that the Transparency Policy never took effect and noting that plaintiff did not offer a "counter affidavit to suggest that [the Department is] requiring people to follow the Transparency Policy." Plaintiff argues that the dismissal of this count should be vacated because the trial court improperly construed facts against it. See *Marshall*, 222 Ill. 2d at 429 (noting that, in reviewing the sufficiency of a complaint, the court "accept[s] as true all well-pleaded facts and all reasonable inferences that may be drawn from those facts" and "construe[s] the allegations in the complaint in the light most favorable to the plaintiff"). In addition, plaintiff argues that the trial court committed an error of law by relying on Jimenez's verification "to dispute facts." Plaintiff has forfeited review of this issue.

¶ 36 In *Foxcroft Townhome Owners Ass'n v. Hoffman Rosner Corp.*, 96 Ill. 2d 150, 153 (1983), the supreme court set forth the circumstances under which a party who files an amended complaint forfeits any objection to the trial court's ruling on any former complaints, or certain counts therein. The court explained that, " '[w]here an amendment is complete in itself and does not refer to or adopt the prior pleading, the earlier pleading ceases to be a part of the record for most purposes being in effect abandoned and withdrawn.' " *Foxcroft Townhome Owners Ass'n*, 96 Ill. 2d at 154 (quoting *Bowman v. County of Lake*, 29 Ill. 2d 268, 272 (1963)). There

are several methods by which a plaintiff may avoid the consequences of the *Foxcroft* rule. *Childs v. Pinnacle Health Care, LLC*, 399 Ill. App. 3d 167, 176 (2010). First, the plaintiff may stand on the dismissed pleading and file an appeal. *Du Page Aviation Corp., Flight Services, Inc. v. Du Page Airport Authority*, 229 Ill. App. 3d 793, 800 (1992). Second, the plaintiff may file an amended complaint realleging, incorporating by reference, or referring to the claims set forth in the prior complaint. *Doe v. Roe*, 289 Ill. App. 3d 116, 119 (1997). Third, the plaintiff may perfect an appeal from an order dismissing fewer than all of the counts of his or her complaint prior to filing an amended pleading that neither refers to nor adopts the dismissed counts. *Brown Leasing, Inc. v. Stone*, 284 Ill. App. 3d 1035, 1043-44 (1996).

¶ 37 In this case, plaintiff did not pursue any of these three exceptions to the *Foxcroft* rule. It did not stand on the dismissed pleading and file an appeal. Instead, it requested permission to file an amended complaint. Further, plaintiff's amended complaint did not refer to or adopt count III of the prior pleading. See *Tabora v. Gottlieb Memorial Hospital*, 279 Ill. App. 3d 108, 114 (1996) (noting that "[a] simple paragraph or footnote in the amended pleadings notifying defendants and the court that plaintiff was preserving the dismissed portions of his former complaints for appeal" is sufficient to protect against forfeiture under *Foxcroft*). Additionally, plaintiff did not appeal from the dismissal of count III prior to filing an amended pleading that neither refers to nor adopts the dismissed counts. Rather, it appealed the order

dismissing count III of its initial complaint *after* the trial court ruled on the amended complaint. Given these circumstances, plaintiff has forfeited its challenge to the dismissal of count III of the original complaint. See *Cwikla*, 345 Ill. App. 3d at 27-28 (holding, *sua sponte*, that, pursuant to the *Foxcroft* rule, the plaintiffs forfeited their claim where they failed to reallege it in an amended pleading); see also *Bonhomme v. St. James*, 2012 IL 112393, ¶¶ 16-31 (holding that the plaintiff abandoned claims that were dismissed with prejudice and were not "referenced or incorporated" in subsequent amended complaint).[1]

¶ 38 Forfeiture notwithstanding, we would affirm the dismissal of count III of the original complaint. Defendant moved to dismiss count III of the original complaint pursuant to section 2- 619(a)(9) of the Code (735 ILCS 5/2-619(a)(9) (West 2020)). That provision provides for involuntary dismissal where "the claim asserted against defendant is barred by other affirmative matter avoiding the legal effect of or defeating the claim." 735 ILCS 5/2-619(a)(9) (West 2020). Although section 2-619 is not the proper method to contest the truth of a factual allegation (*Reynolds v. Jimmy John's Enterprises, LLC*, 2013 IL App (4th) 120139, ¶ 51), it does allow the movant to seek dismissal based on easily proven issues of fact (*United City of Yorkville v. Fidelity & Deposit Co. of Maryland*, 2019 IL App (2d) 180230, ¶ 126; *Reynolds*, 2013 IL App (4th) 120139, ¶ 30). However, those facts must relate to the affirmative matter that is the asserted basis for the dismissal. *United City of Yorkville*, 2019 IL App (2d) 180230, ¶ 126; *Reynolds*, 2013 IL App (4th) 120139, ¶ 30.

¶ 39 "The phrase 'affirmative matter' encompasses any defense other than a negation of the essential allegations of the plaintiff's cause of action." *Kedzie & 103rd Currency Exchange, Inc. v. Hodge*, 156 Ill. 2d 112, 115 (1993); see also *Cwikla*, 345 Ill. App. 3d at 29 (noting that "affirmative matter" for the purposes of a section 2-619 motion is something in the nature of a defense that negates the cause of action completely refutes crucial conclusions of law or conclusions of material fact contained in or inferred from the complaint). If the "affirmative matter" asserted is not apparent on the face of the complaint, the motion to dismiss must be supported by affidavit. *Kedzie & 103rd Currency Exchange, Inc.*, 156 Ill. 2d at 116. By presenting an adequate affidavit in support of the asserted defense, the defendant satisfies the initial burden of going forward on the section 2-619 motion. *Kedzie & 103rd Currency Exchange, Inc.*, 156 Ill. 2d at 116. The burden then shifts to the plaintiff to establish that the defense is unfounded or requires the resolution of an essential element of material fact before it is proven. *Kedzie & 103rd Currency Exchange, Inc.*, 156 Ill. 2d at 116. The plaintiff may meet this burden by affidavit or other proof. *Kedzie & 103rd Currency Exchange, Inc.*, 156 Ill. 2d at 116. "A counteraffidavit is necessary *** to refute evidentiary facts properly asserted by affidavit supporting the motion else the facts are deemed admitted." *Kedzie & 103rd Currency Exchange, Inc.*, 156 Ill. 2d at 116. If, after considering the pleadings and affidavits, the trial court determines that the plaintiff has failed to carry the shifted burden of going forward, the motion to dismiss may be granted. *Kedzie & 103rd Currency Exchange, Inc.*, 156 Ill. 2d at 116.

¶ 40 Applying these principles to the case at bar, even if the promulgation of the Transparency Policy did not comply with the rulemaking provisions of the Act, whether it became part of the Manual and

was an official policy or rule of the Department is an easily proved issue of fact that would defeat plaintiff's claim against defendant. Plaintiff did not append a copy of the entire Manual to its complaint. Thus, whether the Transparency Policy is part of the Manual is not apparent on the face of the complaint. Accordingly, defendant attached to her motion to dismiss a copy of the entire Manual as well as a "verification" from Jimenez, the Department's Older Americans Act services supervisor (see 735 ILCS 5/1-109 (West 2020) (providing for "[v]erification by certification"). See *In re Estate of Mosquera*, 2013 IL App (1st) 120130, ¶ 24 (holding that a verification under section 1-109 of the Code is an acceptable substitute for an affidavit for purposes of a motion to dismiss under section 2-619). In the verification, Jimenez stated that the Department does not have a transparency policy. He explained that in 2018 the Department proposed the Transparency Policy at issue as an addition to the Manual. However, the Transparency Policy "was never implemented or added to the *** Manual" and "is not an official policy of the Department." Jimenez further stated that the Department does not require AAAs to comply with the requirements in the Transparency Policy. A review of the entire Manual submitted by defendant shows that the Transparency Policy is not included therein. By presenting adequate evidence that the Transparency Policy was never implemented or made part of the Manual, defendant satisfied the initial burden of going forward on the motion to dismiss. See *Kedzie & 103rd Currency Exchange, Inc.*, 156 Ill. 2d at 116. The burden then shifted to plaintiff. *Kedzie & 103rd Currency Exchange, Inc.*, 156 Ill. 2d at 116. A counteraffidavit was necessary

to refute the evidentiary facts established by defendant in support of her motion. However, plaintiff did not produce a counteraffidavit or any other evidence. See *Kedzie & 103rd Currency Exchange, Inc.*, 156 Ill. 2d at 116. Therefore, the evidentiary facts in the motion to dismiss were deemed admitted. See *Kedzie & 103rd Currency Exchange, Inc.*, 156 Ill. 2d at 116. Since the Transparency Policy was never implemented, added to the Manual, or made an official policy, whether the Department followed the Act's rulemaking provisions in developing the policy is beside the point. Accordingly, the trial court correctly found that plaintiff failed to carry the shifted burden of going forward on this issue and dismissal of count III of the original complaint pursuant to section 2-619(a)(9) of the Code was proper.

¶ 41 C. First Amended Complaint

¶ 42 Plaintiff also challenges the trial court's dismissal of all six counts of its first amended complaint. We address each count in turn. Prior to doing so, however, we note that plaintiff challenges the trial court's dismissal of several of the counts on the ground that the trial court improperly construed facts against it. See *Marshall*, 222 Ill. 2d at 429 (noting that, in reviewing the sufficiency of a complaint, the court "accept[s] as true all well-pleaded facts and all reasonable inferences that may be drawn from those facts" and "construe[s] the allegations in the complaint in the light most favorable to the plaintiff"). We do not address these claims, since we conduct our own review of plaintiff's allegations *de novo*. See *Hadley*,

2015 IL 118000, ¶ 29; *Malinksi*, 2014 IL App (2d) 130685, ¶ 6; see also *O'Callaghan*, 2015 IL App (1st) 142152, ¶ 17 (noting that a reviewing court conducting *de novo* review may affirm the court's judgment on any basis in the record, regardless of the trial court's reasoning).

¶ 43 1. Count I—The Manual

¶ 44 Plaintiff argues that the dismissal of count I of its first amended complaint should be vacated because the trial court committed two errors of law in dismissing that count. First, plaintiff contends that the trial court erred in dismissing count I, because it failed to find any pleading defects. Second, it contends that the case law cited by the court in support of its decision was inapplicable. Defendant responds that the court properly dismissed count I because, outside of the Monitoring Policy, plaintiff failed to identify any specific provision of the Manual that constitutes a rule. Alternatively, defendant argues that plaintiff's claims regarding the Manual are untimely.

¶ 45 We conclude that count I was properly dismissed for two reasons. First, with the exception of its claim regarding the Monitoring Policy, plaintiff failed to timely raise its claims regarding the Manual. Second, contrary to plaintiff's contention, there *is* a pleading defect in count I of plaintiff's first amended complaint.

¶ 46 Section 5-35(b) of the Act provides that "[a] proceeding to contest any rule on the ground of non-compliance with the procedural requirements of [the

Act's rulemaking provisions] must be commenced within 2 years from the effective date of the rule." 5 ILCS 100/5-35(b) (West 2020). The Manual consists of 12 sections, labeled from 100 to 1200. The Manual was published in 1983, with revisions made thereafter. Each section indicates when that particular section was published or revised. Sections 100, 300, 400, 800, and 1200 were published in 1983. Sections 200, 500, and 700 were revised in 1998. Section 1100 was revised in 2012. Section 900 was revised in 2013. Section 600 was revised on January 1, 2018. Section 1000 was revised on August 1, 2018. Plaintiff initiated this action on January 16, 2020, when it filed its original complaint. Thus, other than section 1000, every section of the Manual was published before January 16, 2018. Accordingly, with the exception of section 1000 (which is discussed in relation to count II below), count I is untimely under the Act and was subject to dismissal on this basis. 5 ILCS 100/5-35(b) (West 2020); *Filliung*, 387 Ill. App. 3d at 53; 735 ILCS 5/2-619(a)(5) (West 2020). Although the trial court did not dismiss count I of the first amended complaint on this basis, it was raised and briefed in the trial court, and this court may affirm the trial court's ruling on any basis in the record. *O'Callaghan*, 2015 IL App (1st) 142152, ¶ 17; see also *Rivera v. Allstate Insurance Co.*, 2021 IL App (1st) 200735, ¶ 25 (noting that appellate court may affirm a dismissal on any basis apparent in the record, regardless of the circuit court's reasoning or the section of the Code upon which the courtrelied).

¶ 47 In the trial court, plaintiff attempted to create a question of fact regarding the Manual's effective

dates through an affidavit from its executive director, which was attached to plaintiff's response to defendant's motion to dismiss the first amended complaint. In the affidavit, the executive director stated that he was "disputing the effective dates for policies contained in the Manual," because defendant did not establish how the effective dates were determined or how the effective dates can be changed. However, speculating that the Manual's sections may have had different effective dates cannot create a genuine issue of material fact to defeat a section 2-619 motion. See *Valfer v. Evanston Northwestern Healthcare*, 2016 IL 119220, ¶ 20 (providing that unsupported conclusions, opinions, or speculation are insufficient to raise a genuine issue of material fact); *Rojo v. Tunick*, 2021 IL App (2d) 200191, ¶ 47 (noting that, in reviewing a dismissal under section 2-619, the relevant inquiry is whether the existence of a genuine issue of material fact should have precluded the dismissal). Without any evidence that the Manual's sections had different effective dates, plaintiff cannot show that its claim was timely.

¶ 48 Plaintiff also argued in the trial court that the Act's limitations period applies only to rules that have been "approved" under the Act's notice-and-comment rulemaking procedure. However, the Act expressly states that the limitations period applies to challenges "on the ground of non- compliance with the procedural requirements" of the Act's rulemaking provisions. 5 ILCS 100/5- 35(b) (West 2020). In the first amended complaint, plaintiff challenged the policies at issue, arguing that they were rules that were required to be adopted through

the Act's rulemaking procedures but that they were not so adopted. Plaintiff therefore concluded that the policies were invalid "because they have not been adopted pursuant to the *** Act." Plaintiff therefore placed the limitations period at issue by asserting that the Manual was not adopted in accordance with theAct's rulemaking provisions.

¶ 49 Secondly, even if plaintiff had timely challenged the Manual, there is, contrary to plaintiff's contention, a pleading defect in count I of plaintiff's first amended complaint. Count I alleges that the entire Manual is invalid, but, as defendant notes, aside from the Monitoring Policy, plaintiff cites no specific provision of the Manual that constitutes a rule under the Act. Defendant's first amended complaint consisted of the following components: (1) an introductory paragraph, (2) a section entitled "Nature" that stated that defendant "is using invalid rules to regulate the conduct of [plaintiff] and [plaintiff's] grantees" and alleged that "[t]he rules are invalid because they have not been adopted pursuant to the *** Act," (3) a section listing the parties (paragraphs 1-5); (4) a brief overview of the Act (paragraphs 6-9), (5) a section entitled "Department Rules" that briefly discussed the six "rules" being challenged (paragraphs 10-28), (6) the six counts of the complaint (paragraphs 29-52), and (7) a prayer for relief.

¶ 50 With respect to the Manual, the "Department Rules" section of the complaint provided as follows:

"10. The Department has issued the *Area Agencies Policies and Procedures Manual* (Manual).

11. The Manual states that it 'is the official document' for regulating the conductof [plaintiff] and [plaintiff's] grantees.
12. [Plaintiff] risks losing funding by not complying with the Manual."

Count I alleged as follows:
"29. Paragraphs 1-28 above are incorporated into Count I.

30. The Manual is a rule which must be adopted through the Rule Process.

31. The Manual has not been adopted through the Rule Process.

32. The Manual is an invalid rule under the *** Act."

In its prayer for relief, plaintiff requested that the trial court enter an order "stating" that the Manual is invalid.

¶ 51 As the foregoing illustrates, while plaintiff makes conclusory allegations that the Manual is a rule that must be adopted through the Act's rulemaking procedures, nowhere in count I of the first amended complaint does plaintiff identify the provisions of the Manual it is challenging or set forth facts supporting why the various sections of the Manual constitute a rule. This was fatal to count I of plaintiff's complaint. See *Pooh-Bah Enterprises, Inc.*, 232 Ill. 2d at 473 (noting that a plaintiff may

not rely on mere conclusions of law or fact unsupported by specific factual allegations); *Pilotto v. Urban Outfitters West, L.L.C.*, 2017 IL App (1st) 160844, ¶ 8 (observing that Illinois is a fact-pleading state; therefore, conclusions of law and conclusory allegations unsupported by specific facts are not sufficient to survive dismissal). Accordingly, for the foregoing reasons, count I of plaintiff's first amended complaint was properly dismissed.

¶ 52 2. Count II—The Monitoring Policy

¶ 53 Next, plaintiff argues that the dismissal of count II of its first amended complaint should be vacated because the trial court improperly determined that the Monitoring Policy was exempt from the Act's rulemaking provisions under section 5.02 of the Illinois Act on the Aging (20 ILCS 105/5.02 (West 2020) (providing that the Act's rulemaking procedures "do[ ] not apply to the adoption of any rule required by federal law in connection with which the Department is precluded by law from exercising any discretion")). According to plaintiff, this exception does not apply because the Department exercised discretion in publishing the Monitoring Policy. In this regard, plaintiff reasons that the Monitoring Policy does not recite the text of the federal monitoring requirements verbatim and the Department made "significant changes" to the federal monitoring requirements in issuing the Monitoring Policy.

¶ 54 Defendant's response is threefold. First, defendant argues that, rather than setting forth substantive rights or duties, the Monitoring Policy

"merely describes existing federal and state laws requiring that the Department and [plaintiff] monitor their respective subrecipients." Second, defendant responds that, even if some provisions in the Monitoring Policy constitute "rules," section 5.02 of the Illinois Act on the Aging (20 ILCS 105/5.02 (West 2020)) exempted them from notice-and-comment rulemaking because they are required by federal law. Finally, defendantcontends that plaintiff's claim regarding the Monitoring Policy is untimely under section 5-35(b) of the Act (5 ILCS 100/5-35(b) (West 2020) (providing that "[a] proceeding to contest any rule on the ground of non-compliance with the [Act's rulemaking provisions] must be commenced within 2 years from the effective date of the rule")).

¶ 55 Initially, we address defendant's argument that plaintiff's claim regarding the Monitoring Policy is untimely. As noted above, the Monitoring Policy comprises section 1000 of the Manual. Defendant acknowledges that the Monitoring Policy was published on August 1, 2018, which is less than two years prior to plaintiff's initiation of this lawsuit. She claims, however, that the specific provisions of the Monitoring Policy challenged in count II of the first amended complaint have been in the Manual since 2007. In this regard, she asserts that, although the Monitoring Policy was changed in August 2018, the primary change at that time was the addition of subsection 1002, which plaintiff does not challenge in its first amended complaint. Since plaintiff's challenge to the Monitoring Policy involves provisions enacted more than two years prior to the date of the initiation of this litigation, defendant

maintains, count II of the first amended complaint should be dismissed as untimely. See 5 ILCS 100/5-35(b) (West 2020). We reject defendant's timeliness claim with respect to count II for two principal reasons. First, a review of count II shows that plaintiff challenges various portions of the Monitoring Policy, including subsection 1002 of the Manual. Moreover, even if the primary change to the Monitoring Policy in August 2018 involved the addition of section 1002, our review of the 2007 and 2018 versions of the Monitoring Policy show that other provisions were also altered at the time, including subsections 1001, 1003, 1004, 1005, and 1007.

¶ 56 Despite our disagreement with defendant on the timeliness issue, we reject plaintiff's claim that the trial court erred in dismissing count II of the first amended complaint. Not every action taken by an administrative agency constitutes a rule. *Freedom Oil Co. v. Pollution Control Board*, 275 Ill. App. 3d 508, 517 (1995). Nor must "rules be adopted to cover every conceivable issue." *Freedom Oil Co.*, 275 Ill. App. 3d at 517. As noted, the Act defines a "rule" as an "agency statement of general applicability that implements, applies, interprets, or prescribes law or policy." 5 ILCS 100/1-70 (West 2020). However, the term does not include "statements concerning only the internal management of an agency and not affecting private rights or procedures available to persons or entities outside the agency," "informal advisory rulings," "intra-agency memoranda," or "the prescription of standardized forms." 5 ILCS 100/1-70 (West 2020). Additionally, the Act's rulemaking provisions do not apply to (1) "a matter

relating solely to agency management or personnel practices or to public property, loans, or contracts" (5 ILCS 100/5-35(c) (West 2020)) or (2) "the adoption of any rule required by federal law in connection with which the Department is precluded by law from exercising any discretion" (20 ILCS 105/5.02 (West 2020)).

¶ 57 Older Americans Act grants are subject to the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards (Uniform Guidance), which is codified at Part 200 of Title 2 of the Code of Federal Regulations (2 C.F.R. § 200.0 *et seq*. (2020)), a set of procedural rules that apply to federal agencies that make federal awards to "non-Federal entities." 2 C.F.R. § 200.101(a) (2020). Additionally, HHS has its own regulations mirroring those of the Uniform Guidance that apply to Older Americans Act grants. 45 C.F.R. §§ 75.101(a), (b), 1321.5(b) (2020). A court may take judicial notice of administrative rules and regulations. See *In re Marriage of Wehr*, 2021 IL App (2d) 200726, ¶ 30.

¶ 58 For purposes of the Uniform Guidance, both the Department and AAAs are considered "non-Federal entities." See 2 C.F.R. § 200.69 (2020) (defining "Non-Federal entity" in relevant part as "a state, local government, *** or nonprofit organization that carries out a Federal awards a recipient or subrecipient"); 45 C.F.R. § 75.2 (2020) (same). The Department, as the entity that receives funds "directly from" the federal government, is also a "recipient," whereas AAAs are "subrecipients" because they receive funds from the Department.

See 2 C.F.R. §§ 200.86, 200.93 (2020) (defining "recipient" and "subrecipient"); 45 C.F.R. § 75.2 (2020) (same). Both the Department and AAAs are also classified as "pass-through entities" because they pass the federal funds that they receive on to "a subrecipient to carry out part of a Federal program." See 2 C.F.R.§ 200.74 (2020) (defining "pass-through entity"); 45 C.F.R. § 75.2 (2020) (same).

¶ 59 As pass-through entities, both the Department and AAAs must "[m]onitor the activities" of their respective subrecipients "as necessary to ensure that the subaward is used for authorized purposes, in compliance with Federal statutes, regulations, and the terms and conditions of the subaward; and that subaward performance goals are achieved." 2 C.F.R. § 200.331(d) (2020); 45 C.F.R. § 75.352(d) (2020). As part of this monitoring, a pass-through entity must perform "audits" and "on-site reviews" of its subrecipient's programs and provide the subrecipient with a written determination of its findings and proposed corrective actions. 2 C.F.R. § 200.331(d)(2)-(3) (2020); 45 C.F.R. §§ 75.2, 75.352(d)(2)-(3) (2020). Further, pass-through entities must follow-up to "ensur[e] that the subrecipient takes timely and appropriate action" to correct any deficiencies. 2 C.F.R. § 200.331(d)(2) (2020); 45 C.F.R. § 75.352(d)(2) (2020).

¶ 60 At least annually, each nonfederal entity receiving Older Americans Act funds—service providers, AAAs, and the Department—must submit "performance reports" to the entity from which it received federal funds, *i.e.*, service providers report to AAAs and AAAs report to the

Department. 45 C.F.R. § 75.342(b)(1) (2020). The Department, in turn, must submit its own performance report to HHS. 45 C.F.R. § 75.342(b) (2020). Moreover, AAAs must retain for three years "[f]inancial records, supporting documents, statistical records, and all other *** records pertinent to" its Older American Act awards. 2 C.F.R. § 200.333 (2020); 45 C.F.R. § 75.361 (2020). With this information in mind, we turn to the allegations in count II of plaintiff's first amended complaint.

¶ 61 Plaintiff challenged seven provisions of the Monitoring Policy as constituting improper rulemaking by the Department. First, plaintiff alleged that the Department engaged in rulemaking by providing in section 1007(A)(1) of the Manual that AAAs "will develop and use systematic procedures and an instrument for conducting subgrantee and subcontractor evaluations." As detailed above, however, an AAA already has a responsibility to monitor and evaluate its subgrantees and subcontractors. See, *e.g.*, 2 C.F.R. § 200.331(d) (2020); 45 C.F.R. § 75.352(d) (2020). Thus, as the trial court determined, requiring that the evaluations be done in a "systematic" way is axiomatic and does not constitute rulemaking.

¶ 62 Second, plaintiff challenged section 1007(A)(2)(a) of the Manual, which requires that the AAA evaluation instrument for subgrantees or subcontractors provide "a comprehensive on-site evaluation of sub grantees and/or subcontractors at least once during the [AAA's] area plan cycle" and "conduct additional evaluations of

subgrantees/subcontractors based on the risk assessment and monitoring process." As noted above, however, federal regulations envision that pass-through entities conduct "on-site" reviews of subrecipients to detect deficiencies pertaining to any federal grant. 2 C.F.R. § 200.331(d)(2) (2020); 45 C.F.R. § 75.352(d)(2) (2020). Further, the requirement that AAAs conduct reviews at least once during the area plan cycle is implicit in the requirement of the federal regulations that the activities of subrecipients be monitored. 2 C.F.R. § 200.331(d) (2020); 45 C.F.R. § 75.352(d) (2020). Because area plans are in effect for only three years (89 Ill. Adm. Code 230.130(a) (2002)), monitoring a subgrantee's or subcontractor's performance under an area plan must be performed at least once during the three-year cycle the area plan is in effect. Otherwise, an entire cycle could pass without any evaluation into a service provider's compliance with an area plan. Furthermore, the direction to conduct additional evaluations based on the results of any evaluation restates federal rules requiring that monitoring be performed "as necessary." 2 C.F.R. § 200.331(d) (2020); 45 C.F.R. § 75.352(d) (2020).

¶ 63 Third, plaintiff challenged section 1007(A)(2)(c) of the Manual, which requires the "submission of a written report on the [AAA's] findings to the subgrantees and/or subcontractors within a reasonable time period." However, federal rules already require AAAs to issue to service providers a written report of their findings. 2 C.F.R. § 200.331(d)(3) (2020) (requiring pass- through entities to provide subrecipients with a written determination of findings); 45 C.F.R. §§ 75.2,

75.352(d) (2020) (same).

¶ 64 Fourth, plaintiff challenged section 1007(C) of the Manual, which requires AAAs to "maintain documentation of all review, monitoring and related follow-up activities." This provision, however, merely restates an AAA's recordkeeping duties under federal rules. See 2 C.F.R. § 200.333 (2020); 45 C.F.R. § 75.361 (2020).

¶ 65 Fifth, plaintiff challenged section 1004(C)(1)(c) of the Manual. That section provided that, when the Department recommends corrective action as a result of its evaluation of an AAA, "if needed, the [AAA] will develop and implement a work plan to ensure that [it] carries out recommended corrective action in a timely manner." But the federal regulations require follow-up to ensure that a subrecipient "takes timely and appropriate action on all deficiencies pertaining to the Federal award." 2 C.F.R. § 200.331(d)(2) (2020); 45 C.F.R. § 75.352(d)(2) (2020).

¶ 66 Plaintiff also challenged section 1003(B)(1) of the Manual, which provides that evaluations will be "performed on-site a minimum of once during the Area Plan cycle which has been by [*sic*] Department *** policy to be a three-year time period to determine the extent of the agency's adherence with conditions of awards documents, prevailing statutory and regulatory laws, rules, policies and significant procedures" and allows that the Department "may conduct additional evaluations of an [AAA] based on the risk assessment and monitoring process outlined in Section 1002 and

Section 1005." As noted above, however, the requirement that AAAs conduct reviews at least once during the area plan cycle is implicit in the federal regulations' requirement that the activities of subrecipients be monitored. 2 C.F.R. § 200.331(d) (2020); 45 C.F.R. § 75.352(d) (2020). Furthermore, the direction to conduct additional evaluations based on the results of any evaluation restates federal rules requiring that monitoring be performed "as necessary." 2 C.F.R. § 200.331(d) (2020); 45 C.F.R. § 75.352(d) (2020); see also 89 Ill. Adm. Code 230.370 (2002) (providing that "[p]rogram and financial reviews shall be conducted for the purpose of evaluating [AAA] compliance with *** the approved area plan").

¶ 67 Finally, plaintiff contests sections 1002 through 1006 of the Manual, which require AAAs to "comply with Department risk assessments, evaluations, on-site evaluations, monitoring, and special reviews of [AAAs]." Again, the federal and state regulations referenced above mandate that AAAs comply with such monitoring and evaluations. The Manual therefore adds no requirement to comply with mandates not already expressed in existing laws.

¶ 68 Plaintiff contends that the Manual makes "significant changes" to existing federal and state laws. However, plaintiff does not indicate what those changes are or explain how the Manual's language alters any existing federal and state monitoring rules. Plaintiff has therefore forfeited its conclusory argument that the Manual made "significant changes" to existing law. Ill. S. Ct. R.

341(h)(7) (eff. Oct. 1, 2020) (providing that the appellant's brief must contain the "contentions of the appellant and the reasons therefor"); *Gandy v. Kimbrough*, 406 Ill. App. 3d 867, 876 (2010) (holding that argument lacking analysis of relevant authority or a cohesive legal argument regarding their application is forfeited).

¶ 69 For the foregoing reasons, we affirm the dismissal of count II of plaintiff's first amended complaint.

¶ 70 3. Count III—The Tracking E-mail

¶ 71 Next, plaintiff argues that the dismissal of count III of its first amended complaint should be vacated because the trial court improperly determined that the Tracking E-mail was not a rule. Plaintiff argues that, in so concluding, the trial court committed three errors of law. First, the court failed to find any pleading defects in count III. Second, the court improperly read an exception into the Act for "minor administrative tasks." Third, the court improperly relied on federal case law. Defendant responds that the trial court properly dismissed count III. Defendant posits that the Tracking E-mail was not subject to the Act's rulemaking provisions because its implementation was merely the "prescription of a standardized form" that did not impose on AAAs any new duties that did not already exist in federal or state law.

¶ 72 In count III of its first amended complaint, plaintiff alleged that the Tracking E-mail constituted a rule that must be adopted through the

Act's rulemaking provisions because the Department "exercised discretion" by including policies not required by federal law. Specifically, plaintiff cited a requirement in the Tracking E-mail that AAAs track and report, via a provided spreadsheet, information such as the operating hours of senior centers, the date of reopening, the date of reclosure due to COVID-19 (if applicable), and the date of the subsequent reopening. Plaintiff suggested that, by imposing these duties, the Department "exercised discretion," thereby taking the Tracking E-mail outside of the exception providing that "the adoption of any rule required by federal law in connection with which the Department is precluded by law from exercising any discretion." See 20 ILCS 105/5.02 (West 2020).

¶ 73 We conclude that the trial court properly dismissed count III of the first amended complaint. The Tracking E-mail was not subject to the Act's rulemaking provisions for two reasons. First, by asking AAAs to keep track of senior centers that had reopened during the COVID-19 pandemic, the Department was complying with federal regulations that require it to ensure that senior centers "compl[y] with all applicable State and local health *** laws, ordinances or codes." 45 C.F.R. § 1321.75(a) (2020); see also 89 Ill. Adm. Code 230.250(a)(3)(A) (1991) (stating that a recipient of any award for multipurpose senior center activities "shall comply with all applicable State and local health *** laws, ordinances or codes"). The Tracking E-mail was initiated during Phase 4 of the Governor's reopening plan as part of the pandemic response, which required masks to be worn in indoor public places

and limited indoor gatherings to 50 people. See Exec. Order No. 2020-43, 44 Ill. Reg. 11,704 (June 26, 2020),https://www2.illinois.gov/Documents/ExecOrders/2020/ExecutiveOrder-2020-43.pdf[https://perma.cc/ L3NY -VCK5].[2] To ensure that senior centers were complying with those requirements, as well as any local public health requirements, the Department had to know which senior centers were open. Indeed, as the Tracking E-mail indicates, this procedure would ensure that "guidelines for resuming in-person services at senior centers" were followed and that the "the health, safety, and welfare of *** seniors" were being protected. Therefore, the Department appropriately requested that AAAs assist in collecting this information.

¶ 74 Second, the Tracking E-mail does not constitute a "rule" under the Act because its implementation involved the "prescription of standardized forms." The spreadsheet was standardized, as it was sent to all AAAs in the same format and sought the same information. See Webster's Third New International Dictionary 2223 (2002) (defining "standardize" as to "make uniform"). Requiring AAAs to complete the spreadsheet was merely a "prescription" that that form be used. See Webster's Third New International Dictionary 1792 (2002) (defining "prescription" in relevant part as "the process of laying down authoritative rules or directions").

¶ 75 Plaintiff's brief fails to explain why the Tracking E-mail constitutes a rule. Instead, it takes issue with the trial court's analysis of the Act, the

Department's rules, and case law. But, as discussed above, the trial court's reasoning is beside the point where, as here, we apply *de novo* review. See *O'Callaghan*, 2015 IL App (1st) 142152, ¶ 17.

¶ 76 For the foregoing reasons, we therefore affirm the trial court's dismissal of count III of plaintiff's first amended complaint.

¶ 77 4. Count IV—The Conflict-of-Interest Form

¶ 78 Next, plaintiff argues that the dismissal of count IV of its first amended complaint should be vacated because the trial court improperly determined that the Conflict-of-Interest Form was not a rule subject to the Act's rulemaking procedure. In support of this claim, plaintiff argues that the trial court made several legal errors, including failing to grant its motion to add the Ombudsman as a necessary party and misreading "the exception" to the Act's rulemaking provisions in section 5.02 of the Illinois Act on the Aging. Defendant responds that the Conflict-of-Interest Form was not subject to the Act's rulemaking provisions because its implementation was merely the "prescription of a standardized form" that did not impose on AAAs any duties that did not already exist in federal or state law. Further, defendant urges this court to uphold the trial court's denial of plaintiff's request to add the Ombudsman as a party, for two reasons. First, defendant argues that the record on appeal is inadequate to address the issue. Second, defendant argues that adding the Ombudsman would have been "futile."

¶ 79 We first address whether the trial court erred in denying plaintiff's motion to add the Ombudsman as a necessary party. We agree with defendant that plaintiff has failed to provide an adequate record to address this issue. In this regard, we note that, as the appellant, it was plaintiff's burden to provide this court with a complete record on appeal. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391 (1984). Any doubts arising from the incompleteness of the record should be construed against the plaintiff, and, without a complete record, a reviewing court should presume that the trial court's ruling was correct. *Foutch*, 99 Ill. 2d at 392; *Fauley v. Metropolitan Life Insurance Co.*, 2016 IL App (2d) 150236, ¶ 60. As one court has noted, this rule is "especially" important "when the abuse- of-discretion standard applies," because knowing the basis of the court's order is essential to assessing whether the discretion exercised was abused. *Gakuba v. Kurtz*, 2015 IL App (2d) 140252, ¶ 22.

¶ 80 In this case, the trial court had discretion to grant or deny plaintiff's motion to add the Ombudsman as a party. 735 ILCS 5/2-405(a) (West 2020) (providing that "[a]ny person *may* be made a defendant who *** is alleged to have or claim an interest in the controversy" (emphasis added)); 735 ILCS 5/2-406(a) (West 2020) (providing that, "[i]f a complete determination of a controversy cannot be had without the presence of other parties, the court *may* direct them to be brought in" (emphasis added)); 735 ILCS 5/2-616(a) (West 2020) (allowing for an amendment to a complaint to "introduc[e] any party who ought to have been joined as *** defendant" on just and reasonable cause); *Cook v.*

AAA Life Insurance Co., 2014 IL App (1st) 123700, ¶ 35 (reviewing denial of motion to join defendants for an abuse of discretion); *Herron v. Anderson*, 254 Ill. App. 3d 365, 372 (1993) (providing that the denial of a motion to amend a complaint to add an additional party-defendant will not be reversed on appeal absent an abuse of discretion). To this end, the trial court held a hearing on plaintiff's motion to add the Ombudsman as a party on October 14, 2020. The only memorialization of the trial court's decision is a one-sentence order stating that plaintiff's "motion to add party is denied." There is no transcript of the hearing in the record. Without an adequate record to review the trial court's reasons for denying plaintiff's motion, we must presume that the trial court's ruling was correct. *Foutch*, 99 Ill. 2d at 392; *Fauley*, 2016 IL App (2d) 150236,¶ 60.

¶ 81 Plaintiff disputes that the trial court had discretion to add the Ombudsman as a party. In this regard, plaintiff directs us to language in section 2-406(a) of the Code providing that, "[i]f a person, not a party, has an interest or title which the judgment may affect, the court, on application, *shall* direct such person to be made a party." (Emphasis added.) 735 ILCS 5/2-406(a) (West 2020). Plaintiff reasons that the Conflict-of-Interest Form is the Ombudsman's policy, so it has a stake in the litigation. Therefore, relying on the foregoing language of section 2-406(a), plaintiff reasons that the trial court was required to add the Ombudsman as a necessary party. We disagree. A necessary party need not be joined if the party's interests are fully and adequately represented by the parties to the action. *Holzer v. Motorola Lighting, Inc.*, 295 Ill. App. 3d

963, 973 (1998). Defendant clearly represented any interest the Ombudsman had in this action by defending the Ombudsman's request that plaintiff complete the Conflict-of-Interest Form. Indeed, as the agency ultimately responsible for ensuring that the Ombudsman program is free of conflicts, the Department undoubtedly shares the Ombudsman's interest in seeing that AAAs complete the Conflict-of-Interest Form. See 42 U.S.C. § 3058g(f) (2018) (requiring "State agency" to ensure that the Ombudsman program is free of conflicts); 45 C.F.R. § 1324.21(b)(1), (b)(4)(ii) (2020) (requiring Department to "[e]stablish a process for periodic review and identification of conflicts" and disclose any conflicts and the steps taken to remedy them).

¶ 82 Plaintiff insists that the Department could not have adequately represented the interests of the Ombudsman because the Ombudsman and the Department are "clearly adverse parties" under several provisions of 42 U.S.C. § 3058g. However, none of the statutory provisions cited by plaintiff suggest that the Department and the Ombudsman have adverse interests, much less adverse interests in avoiding conflicts of interest. See 42 U.S.C. § 3058g(a)(3)(G)(iii) (2018) (requiring Ombudsman to "facilitate public comment on the laws, regulations, policies, and actions" that affect residents of long-term care facilities); 42 U.S.C. § 3058g(g)(1)(A)(ii) (2018) (providing that the Department "shall ensure that *** adequate legal counsel is available, and is able, without conflict of interest, to *** assist the Ombudsman and representatives of the Office in the performance of the official duties of the Ombudsman and representatives"); 42 U.S.C. §

3058g(g)(2) (2018) (stating that the Department "shall ensure that *** the [Ombudsman] pursues administrative, legal, and other appropriate remedies on behalf of residents"). Indeed, plaintiff does not explain how these particular provisions make the Ombudsman and the Department adverse parties. Plaintiff also contends that the Ombudsman's interests are adverse to those of the Department because "the purpose of the federal law upon which the [Conflict-of-Interest Form] is based is to resolve conflicts between the Department and the Ombudsman." See 45 C.F.R. § 1324.21(b)(1), (b)(2)(i) (2020) (providing that the Department and the Ombudsman "shall identify and take steps to remove or remedy conflicts of interest between the Office and the State agency" and that the Department "shall *** [t]ake reasonable steps to avoid internal conflicts of interest"). Again, nothing in the authority cited by plaintiff suggests that the Department and the Ombudsman have adverse interests, much less adverse interests in avoiding conflicts of interest. More significantly, plaintiff challenged the authority of the Department and the Ombudsman to require AAAs to complete the Conflict-of-Interest Form. As noted above, as the agency ultimately responsible for ensuring that the Ombudsman program is free of conflicts, the Department undoubtedly shares the Ombudsman's interest in seeing that AAAs complete the Conflict-of- Interest Form. See 42 U.S.C. § 3058g(f) (2018) (requiring "State agency" to ensure that the Ombudsman program is free of conflicts); 45 C.F.R. § 1324.21(b)(1), (b)(4)(ii) (2020) (requiring Department to "[e]stablish a process for periodic review and identification of conflicts" and disclose any conflicts

and the steps taken to remedy them). Therefore, plaintiff's arguments that the Department could not have adequately represented the interests of the Ombudsman lack merit and we affirm the trial court's denial of plaintiff's motion to add the Ombudsman as a party.

¶ 83 We now turn to whether the trial court properly dismissed count IV of the first amended complaint. Count IV alleged that the Conflict-of-Interest Form constituted a rule that must be adopted through the Act's rulemaking provisions because the Department "exercised discretion" by including policies not required by federal law. Specifically, plaintiff cited a requirement that each AAA complete the Conflict-of-Interest Form on an annual basis. Plaintiff also referenced a statement in the Conflict-of-Interest Form that the "[f]ailure to disclose a possible conflict of interest may be grounds for removal of designation." However, federal law requires the Department to report and identify any organizational conflict of interest. 42 U.S.C. § 3058g(f)(2)(B)(i) (2018); 45 C.F.R. § 1324.21(b)(1), (b)(4)(ii), (b)(5) (2020). Thus, requiring AAAs to complete the Conflict-of-Interest Form was merely an exercise of that duty and falls within the exception provided by section 5.02 of the Illinois Act on the Aging (20 ILCS 105/5.02 (West 2020) (providing that the Act's rulemaking provisions do not apply to "the adoption of any rule required by federal law in connection with which the Department is precluded by law from exercising any discretion")). Moreover, the Conflict-of-Interest Form's statement that failing to disclose a conflict of interest could result in an AAA losing its designation

is reflected in the Older Americans Act's prohibition of conflicts of interest and federal rules stating that an AAA may lose its designation for failing to comply with federal law. 42 U.S.C. § 3058g(f) (2018); 45 C.F.R. § 1321.35(a)(3) (2020).

¶ 84 Plaintiff seems to acknowledge that federal law requires the Department to report and identify organizational conflicts of interest. It argues, however, that the exception provided for in section 5.02 of the Act "was not intended to exclude from the [Act's rulemaking provisions] policy statements *based* on federal or state law." (Emphasis in original.) In other words, it is plaintiff's position that the Department exercised discretion in publishing the Conflict-of-Interest Form, because it does not recite the text of the federal conflict-of-interest requirements verbatim. We find plaintiff's argument misplaced. First, plaintiff cites no authority for this proposition. Thus, this argument is forfeited. See Ill. S. Ct. R. 341(h)(7) (eff. Oct. 1, 2020) (requiring appellant's brief to consist of argument, "which shall contain the contentions of the appellant and the reasons therefor, with citation of the authorities and the pages of the record relied on" and providing that points not argued are forfeited). We reiterate that section 5.02 of the Illinois Act on the Aging expressly exempts from the Act's rulemaking provisions "the adoption of any rule required by federal law in connection with which the Department is precluded by law from exercising any discretion." 20 ILCS 105/5.02 (West 2020). Federal law requires the Department to report and identify any organizational conflicts of interest. Thus, the Department does not have any

discretion regarding whether it reports and identifies any organizational conflicts of interest. Thus, the Conflict-of-Interest Form falls within the exception provided for by section 5.02 of the Illinois Act on the Aging.

¶ 85 Secondly, like the Tracking E-mail, the Conflict-of-Interest Form does not constitute a "rule" under the Act, because its implementation involved the "prescription of standardized forms." The Conflict-of-Interest Form was standardized, as it was sent to all AAAs in the same format and sought the same information. See Webster's Third New International Dictionary 2223 (2002) (defining "standardize" as to "make uniform"). Further, requiring AAAs to complete the Conflict-of-Interest Form was a "prescription" that that form be used. See Webster's Third New International Dictionary 1792 (2002) (defining "prescription" in relevant part as "the process of laying down authoritative rules or directions").

¶ 86 For the foregoing reasons, we therefore affirm the trial court's dismissal of count IV of plaintiff's first amended complaint.[3]

¶ 87 5. Counts V and VI—The Medicaid Policy and The ROS Memorandum

¶ 88 Next, plaintiff argues that the trial court erred in dismissing count V (regarding the Medicaid Policy) and count VI (regarding the ROS Memorandum) on the basis that plaintiff lacked standing to raise the claims asserted in those

counts. Defendant disagrees, arguing that neither the Medicaid Policy nor the ROS Memorandum applied to plaintiff, so the trial court correctly determined that plaintiff lacked standing to challenge those policies.

¶ 89 The purpose of the standing doctrine is to ensure that courts decide actual specific controversies and not abstract or moot questions. *Powell v. Dean Foods Co.*, 2012 IL 111714, ¶ 36. Standing requires that a party have a real interest in the action and its outcome. *Wexler v. Wirtz Corp.*, 211 Ill. 2d 18, 23 (2004). Thus, to have standing to bring a claim, a party must assert its own legal rights and interests rather than assert a claim for relief based upon the rights of a third party. *Powell*, 2012 IL 111714, ¶ 36. Typically, lack of standing to bring an action is an affirmative defense, and the burden of proving the defense is on the party asserting it. *Lebron v. Gottlieb Memorial Hospital*, 237 Ill. 2d 217, 252 (2010); *Bayview Loan Servicing, LLC v. Cornejo*, 2015 IL App (3d) 140412, ¶ 12. Moreover, lack of standing is an affirmative matter for purposes of section 2-619(a)(9) of the Code. *Muirhead Hui L.L.C. v. Forest Preserve District*, 2018 IL App(2d) 170835, ¶ 21.

¶ 90 Instructive to our analysis is *Pre-School Owners Ass'n of Illinois, Inc. v. Department of Children & Family Services*, 119 Ill. 2d 268 (1988), a case cited by the trial court in its April 2021 memorandum opinion and order. In that case, the supreme court considered whether the plaintiffs had standing to challenge a particular regulation that had been promulgated by the Department of

Children and Family Services (DCFS) under the Child Care Act of 1969 (Ill. Rev. Stat. 1985, ch. 23, ¶¶ 2211 through 2230). The regulation barred from child-care employment persons who had been identified as having committed child abuse or neglect as well as persons awaiting trial or investigation on such allegations. See 89 Ill. Adm. Code 407.10(c), adopted at 7 Ill. Reg. 9215 (eff. Aug. 15, 1983) amended at 8 Ill. Reg. 24937 (1985) (now repealed at 22 Ill. Reg. 1728 (eff. Jan. 1, 1998)). The plaintiffs, an association of day-care centers, argued that the regulation violated due process because it permitted DCFS to bar from child-care employment persons simply accused of certain offenses. The supreme court determined that the plaintiffs lacked standing to challenge the rule, because they had not alleged that they had been subjected to the particular regulation or that they were in imminent danger of harm from its operation. *Pre-School Owners Ass'n of Illinois, Inc.*, 119 Ill. 2d at 287. The court explained that, to have standing, a plaintiff " 'must have sustained, or be in immediate danger of sustaining, a direct injury as a result of enforcement of the challenged statute.' " *Pre-School Owners Ass'n of Illinois, Inc.*, 119 Ill. 2d at 287 (quoting *Illinois Gamefowl Breeders Ass'n v. Block*, 75 Ill. 2d 443, 451 (1979)).

¶ 91 In light of the supreme court's analysis in *Pre-School Owners Ass'n of Illinois, Inc.*, we conclude that the trial court properly granted defendant's motion to dismiss counts V and VI of the first amended complaint on the basis of a lack of standing. The Medicaid Policy states that it pertains to CCUs and specifies that its purpose is to

"advise [CCUs] of changes in [the Department's] policy and procedure related to Mandatory Medicaid application, enrollment, and redetermination." The Medicaid Policy explained that participants in the Community Care Program were "no longer *** exempt from applying for Medicaid," so CCUs should verify whether a participant was receiving Medicaid benefits or had applied for them. Thus, the Medicaid Policy is directed to CCUs, not plaintiff or any other AAA. Indeed, nowhere in its complaint does plaintiff allege that it had sustained a direct injury as a result of the enforcement of the Medicaid Policy or that it was in imminent danger of sustaining such an injury. Additionally, plaintiff did not allege that the Medicaid Policy requires anything of it or that the Department had taken any action against plaintiff for violating the Medicaid Policy. Therefore, the trial court properly granted defendant's motion to dismiss count V of the first amended complaint based on a lack of standing.

¶ 92 We reach the same conclusion with respect to the ROS Memorandum. The ROS Memorandum is directed to Adult Protective Services provider agencies. The ROS Memorandum asked the State's Adult Protective Services provider agencies, in preparing final investigative reports of abuse, neglect, exploitation, or self-neglect, to confirm what "organization *** is providing care coordination services" to the alleged victim. The ROS Memorandum further provides that the ROS "should be sent to the organization coordinating care for the individual at the time of substantiation" and that "it is the responsibility of the [Adult Protective Services] provider to attempt

to share the ROS with the care coordination agency that is actively involved with the individual." Thus, the ROS Memorandum is directed at Adult Protective Services provider agencies, not plaintiff or any other AAA. Nowhere in its complaint does plaintiff allege that it had sustained a direct injury as a result of the enforcement of the ROS Memorandum or that it was in imminent danger of sustaining such an injury. Additionally, plaintiff did not allege that the ROS Memorandum requires anything of it or that the Department had taken any action against plaintiff for violating the ROS Memorandum. Therefore, the trial court properly granted defendant's motion to dismiss count VI of the first amended complaint based on a lack of standing.

¶ 93 Plaintiff insists that it has standing because its first amended complaint alleges that it had been designated the AAA for Area 1 and that it "oversees" the Community Care Program and Adult Protective Services programs in its service area. However, plaintiff cites no authority stating that an entity's general oversight of a government program is sufficient to confer standing to challenge aspects of a policy that are inapplicable to it. Indeed, such a principle is inconsistent with the supreme court's pronouncement that, to have standing, a party challenging a law must have sustained, or be in immediate danger of sustaining, a direct injury as a result of its enforcement. See *Pre-School Owners Ass'n of Illinois, Inc.*, 119 Ill. 2d at 287.

¶ 94 Plaintiff also claims that it has standing because the Act allows the "general public" and

"any interested persons" to comment on proposed rules. See 5 ILCS 100/5-40(b) (West 2020). Plaintiff did not raise this argument before the trial court in response to the motion to dismiss its first amended complaint. Thus, it has been forfeited. *Evanston Insurance Co. v. Riseborough*, 2014 IL 114271, ¶ 36 (concluding that the plaintiff forfeited argument that it "failed to raise *** in its response to [the] defendants' motion to dismiss"). Forfeiture notwithstanding, plaintiff is incorrect that any member of the general public has standing to challenge an administrative rule. The Act's rulemaking provisions say nothing about the general public's ability to bring a lawsuit to invalidate alleged agency rules. They simply provide that members of the general public may comment on proposed rules during the rulemaking procedure. See 5 ILCS 100/5-40(b) (West 2020). Indeed, adopting plaintiff's interpretation would give any member of the public standing to challenge a rule, based solely on his or her self-proclaimed interest in it. This is not the law in Illinois. See *Glisson v. City of Marion*, 188 Ill. 2d 211, 231 (1999) (stating that "a party cannot gain standing merely through a self-proclaimed interest or concern about an issue, no matter how sincere").

¶ 95 Plaintiff also contends that the trial court should have rejected defendant's standing argument because she did not specify the subsection of section 2-619 upon which it was based. We disagree.

¶ 96 Defendant filed her motion to dismiss pursuant to section 2-619.1 of the Code (735 ILCS 5/2-619.1 (West 2020), which allows for combined motions

under sections 2-615 and 2-619 of the Code (735 ILCS 5/2-615, 2-619 (West 2020)). Section 2-619.1 states that a combined motion "shall be in parts." 735 ILCS 5/2-619.1 (West 2020). Further, each part "shall specify that it is made under one of Sections 2-615 [or] 2-619" and "shall *** clearly show the points or grounds relied upon under the Section upon which it is based." 735 ILCS 5/2-619.1 (West 2020).

"Where a motion does not comply with section 2-619.1, commingles claims, or creates unnecessary complications and confusion, trial courts should *sua sponte* reject the motion and give the movant the opportunity (if they wish) to file a motion that meets the statutory requirements of section 2-619.1, or the movant may choose to file separate motions under section 2-615 and section 2-619 ***." *Reynolds*, 2013 IL App (4th) 120139, ¶ 21.

¶ 97 Here, defendant complied with the requirement in section 2-619.1 that each part of a combined motion specify the section under which it is made. Defendant's motion to dismiss was divided into two parts. Defendant labeled one part of her motion as a "Motion to Dismiss Pursuant to 735 ILCS 5/2-619" and the other part as a "Motion to Dismiss Pursuant to 735 ILCS 5/2-615." Each part had multiple sections showing the points or grounds relied upon. The section for dismissal of counts V and VI based on a lack of standing was included in the part of the motion labeled as "Motion to Dismiss Pursuant to 735 ILCS 5/2-619." It is true that the heading on the section seeking dismissal of counts V and VI did not specify the subsection of section 2-619 under which it was made. However, in discussing

the legal standards applicable to motions to dismiss, defendant cited sections 2-619(a)(5) and 2-619(a)(9) (735 ILCS 5/2-619(a)(5), (a)(9) (West 2020)). Further, defendant specified that section 2-619(a)(9) allows for the dismissal of an action "where 'the claim asserted against defendant is barred by other affirmative matter avoiding the legal effect of or defeating the claim,' 735 ILCS 5/2-619(a)(9), *including lack of standing*, *Lyons*

v. Ryan, 201 Ill. 2d 529, 534 (2002)." (Emphasis added.) Given this record, we conclude that defendant did not improperly commingle claims or create unnecessary complications and confusion. See *Reynolds*, 2013 IL App (4th) 120139, ¶ 21. Thus, there is no procedural basis upon which to reverse the grant of defendant's motion to dismiss counts V and VI based on a lack of standing.

¶ 98 D. Motion for Sanctions

¶ 99 Prior to concluding, we note that plaintiff has filed a motion for sanctions pursuant to Illinois Supreme Court Rule 361 (eff. Dec. 1, 2021) and Rule 375 (eff. Feb. 1, 1994). Defendant filed an objection thereto. We ordered the motion and objection taken with the case.

¶ 100 In its motion, plaintiff argues that defendant should be sanctioned for (1) violating the Illinois Rules of Professional Conduct by claiming to represent an adverse party (the Ombudsman),

(2) violating the Illinois Rules of Professional Conduct and the Illinois Supreme Court Rules by misstating facts and law, and (3) disputing facts in violation of the *Marshall* standard (see *Marshall*, 222

Ill. 2d at 429). Plaintiff posits that violating the Illinois Rules of Professional Conduct and misstating facts and law are sanctionable under Illinois Supreme Court Rule 375 (eff. Feb. 1, 1994). Defendant responds that plaintiff's motion for sanctions should be denied because it is meritless and does not point to any harassing or bad-faith conduct on her part.

¶ 101 We agree with defendant that sanctions are not warranted. Plaintiff's motion does not point to any harassing or bad-faith conduct on defendant's part. Although plaintiff takes issue with the merits of the arguments in defendant's response brief, that is not a basis for Rule 375 sanctions. See *Jaworski v. Skassa*, 2017 IL App (2d) 160466, ¶ 19 (noting that even unsuccessful arguments are not sanctionable unless they are "devoid of arguable merit" or otherwise "brought in bad faith"). Hence, in exercise of the discretion we possess regarding this issue, we reject plaintiff's request for sanctions under Rule 375(b).

¶ 102 III. CONCLUSION

¶ 103 For the reasons set forth above, we affirm the judgment of the circuit court of WinnebagoCounty.

¶ 104 Affirmed.

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[1]At oral argument, plaintiff's counsel conceded that plaintiff did not refer to, adopt, or incorporate count III of the original complaint in its amended pleading.

[2] Executive Order 2020-43 is available at www2.illinois.gov/Documents/ExecOrders/2020/ExecutiveOrder-2020-43.pdf (last visited April 15, 2022). Courts may take judicial notice of such documents. See *Kopnick v. JL Woode Management Co.*, 2017 IL App (1st) 152054, ¶ 26 (noting that court may take judicial notice of information on municipality's public website).

[3] A little more than two weeks after filing its opening brief in this appeal, plaintiff filed a "Motion to Vacate the Dismissal of Count IV." Defendant filed a response to the motion, and we ordered the motion taken with the case. In the motion, plaintiff argues that the trial court's failure to add the Ombudsman as a necessary party renders the dismissal of count IV void. In its motion, plaintiff presents additional arguments based on the fact that the Ombudsman sent the Conflict-of- Interest Form to it a "third time." Plaintiff also asserts in the motion that, in correspondence with defendant's counsel, she admitted that the State is not representing the Ombudsman in this litigation. However, the argument regarding whether the Ombudsman should have been added as a necessary party was raised in plaintiff's brief on direct appeal, and we address the argument in this disposition. Nothing plaintiff presents in its motion to vacate alters our analysis. Thus, we deny the motion as moot.

STATE OF ILLINOIS
IN THE CIRCUIT OF THE 17TH JUDICIAL CIRCUIT COUNTY OF WINNEBAGO

2020-MR-38

NORTHWESTERN ILLINOIS AREA AGENCY ON AGING,

Plaintiff,

v.

PAULA BASTA, in her capacity as Director of the Illinois Department on Aging,

Defendant.

MEMORANDUM OPINION AND ORDER

This matter comes before the court on the combined 2-615 and 2-619 motion of defendant Paula Basta, in her capacity as Director of the Illinois Department on Aging (hereinafter the Department), to dismiss plaintiff Northwestern Illinois Area Agency on Aging's (hereinafter NIAAA) First Amended Complaint. Having considered the briefs and arguments of counsel, and the relevant statutes, regulations and case law, the court grants the motion to dismiss for the reasons that follow.

The Illinois Department on Aging is an administrative agency that oversees programs to benefit senior citizens and is the designated agency to

receive and disperse federal funds under the Older Americans Act (OAA), 42 U.S.C. § 3001 *et seq*. Per the OAA, the Department designates public and private nonprofit organizations as area agencies on aging (AAA), which in turn provide services to seniors in a specific geographic zone. 42 U.S.C. § 3025. The Department disperses federal OAA funds to the AAAs for the provision of those services. Plaintiff NIAAA is a private nonprofit entity and the AAA for Area 1, encompassing nine counties in northwest Illinois.

In its First Amended Complaint, NIAAA alleges that the Department has enacted administrative rules that were not adopted pursuant to the process mandated by the Illinois Administrative Procedure Act (APA) and seeks a declaration from this court that those rules are invalid. The Department brings this Motion to Dismiss, contending that the matters complained of are exempt from formal rulemaking as they are rules required by federal law, rules relating to internal management of the Department, rules that already have been promulgated per the APA, or not rules at all, and that NIAAA lacks standing to challenge certain of the alleged rules.

The APA, 5 ILCS 100 *et seq.* , delineates the requirements for the promulgation of rules by administrative agencies. A "rule" is defined as an "agency statement of general applicability that implements, applies, interprets, or prescribes law or policy." It does not include "statements concerning only the internal management of an agency and not affecting private rights or procedures available to persons or entities outside the agency," "informal advisory rulings", or "the prescription of standardized forms." 5 ILCS 100/1-

70. In addition, the APA's rule making provision does not apply to the adoption of any rule required by federal law where the Department is precluded from exercising any discretion. 20 ILCS 105/5.02.

In brief, in order to enact a rule, an agency must give 45 days' notice of its intended action to the general public by publishing the text of the proposed rule in the Illinois Register, and then allow interested persons the opportunity to comment on it. If requested by the Joint Committee on Administrative Rules (JCAR), the Governor, an affected local government, 25 interested individuals, or an association representing at least 100 interested individuals, the agency must hold a public hearing on the proposed rule. Following this first notice period, the agency must submit the proposed rule to JCAR, along with any public comments. JCAR then considers the rule at a meeting within 45 days. If JCAR issues a Certificate of No Objection, the agency may adopt the rule, which is then published in the Illinois Register. 5 ILCS 100/5-40.

Policies and Procedures Manual

In Count I, NIAAA alleges that the Department's Policies and Procedures Manual is a rule which must be adopted through the rulemaking process mandated by the APA, the manual has not been subjected to that process, and therefore, the manual is an unauthorized rule. The Department brings a 2-615 Motion to Dismiss this Count, contending that NIAAA cannot state a claim for declaratory relief because the manual is not a rule, but rather is a summarization of the many legal requirements and duties imposed upon the Department and its grantees by state and federal law.

The Department, like many state and federal administrative agencies, compiles a manual that summarizes the laws, policies and procedures which govern the administration of its statutorily mandated programs. The manual is divided into 12 sections. Section 100 provides a description of OAA programs, and the roles and responsibilities of the Department and its grantees in administering it. Section 200 describes the authorities and responsibilities of the four levels of the aging network: the Federal Administration on Aging, the Department, the AAA and the service provider. Section 300 sets forth the organization, authority and responsibilities of the Department under the OAA and state law. Section 400 describes the organization and authority of the AAAs. Section 500 describes the responsibilities of the AAA for preparation of the area plan. Section 600 describes the purpose, content and standards of services funded under the OAA. Section 700 describes services funded directly with state appropriations. Section 800 describes the purposes, content and standards of services funded by other federal agencies, but related to programs for older Americans. Section 900 describes the reports required to be submitted to the Department. Section 1000 describes the responsibilities of the Department and AAAs for the monitoring and evaluation of AAAs, and AAAs evaluation of subgrantees and subcontractors. Section 1100 describes the specific requirements that must be followed by AAAs and their service providers in order to be compliant with federal and state rules and regulations. Section 1200 describes performance requirements imposed on AAAs and service providers by federal statutes and rules.

Administrative agency manuals have been described by courts as "interpretive guides" to formally promulgated regulations. See, for example, Shiner v. Sullivan, 793 F.Supp. 1257, 1261 (D. Vermont), Kaszynski v. Department of Public Aid, 274 Ill. App. 3d 38, 45 (3"[1] Dist. 1995). The statements made in a manual do not have the force of law and may not be binding if they are inconsistent with applicable statutes or not adopted in compliance with the APA. Kaszynski at 45; see also, Shiner, at 1261. As illustrated by the above summary of the various sections, the Department's manual appears to be an "interpretive guide" that describes federal and state programs, summarizes federal and state law requirements, outlines internal procedures of the Department, and delineates requirements for the AAAs and their service providers. To the extent that the manual explains state and federal programs and summarizes the requirements of state and federal statutes, it is not enacting a rule that requires compliance with APA rulemaking procedures. To the extent the manual sets forth policies for the internal management of the Department, it is not required to follow formal rulemaking procedures. 5 ILCS 100/1-70. To the extent that the manual summarizes policies and procedures that have been promulgated through formal rulemaking, it is not required to undergo formal rulemaking again. To the extent that the manual mandates certain actions by AAAs that are required by federal law, it is not obligated to submit those directives to the formal rulemaking process. 20 ILCS 105/5.02. If there is some purported requirement in the manual imposed on AAAs that rises to the level of a rule, is being enforced by the Department, is not subject to an exemption, and has not been previously promulgated per the rulemaking process, that requirement may be invalid and

potentially could be challenged on that ground. But the contention that the entire manual itself must undergo the rulemaking process is unsupported by any authority and unconvincing given the nature of the manual.

Policies and Procedures Manual Section 1000

In Count II, NIAAA alleges that Section 1000 of the manual, titled Evaluation, Monitoring and Special Reviews, is a rule that must be adopted through the rulemaking process, was not so adopted, and therefore is an invalid rule. The Department brings a 2-615 Motion to Dismiss this Count, contending that NIAAA cannot state a clam for declaratory relief because this section is not implementing any new law or policy, but merely summarizes what is already required by federal law, the Illinois Grant Accountability and Transparency Act, and the Illinois Administrative Code.

Both federal and state laws and regulations require periodic evaluations and audits of recipients of federal funds to ensure compliance with federal statutes, regulations and the terms and conditions of an award. Per 2 C.F.R. 200.328-332, pass-through entities are required to monitor subaward recipients for compliance with federal statutes and regulations and the terms and conditions of the subaward, and to ensure that subaward performance goals are achieved. Grant recipients must undergo financial and administrative risk assessments per 44 Ill. Admin. Code 7000.90 and 70000.340. The Department is required to monitor the administration of AAA area plans and conduct periodic performance evaluations of AAAs per 89 Ill. Admin. Code 230.43 (a)(4) and (9).

Per 89 Ill. Admin. Code 230.150 (b)(4), AAAs are required to monitor and periodically evaluate the performance of all service providers under the area plan.

The requirements outlined in Section 1000 of the manual are based on these federal and state regulations. Section 1001 simply states the purpose of the chapter and is not a rule. Section 1002 describes the elements that will be evaluated and the factors the Department will weigh in assessing AAAs for risk of noncompliance with federal and state statutes, regulations and terms and conditions of the subaward. Much of the language in Section 1002 is taken directly from the requirements of 2 C.F.R. 200.332, including the risk assessment factors and some of the options to reduce risk outlined in the section. Section 1003 describes the Department's responsibility to ensure AAAs are in compliance with their award requirements, as mandated by the above cited regulations, and defines the terms used in the section. Section 1004 outlines the procedures that the Department will follow in conducting its evaluation functions. These are the Department's internal operating procedures in carrying out its responsibility to evaluate an AAA's performance under its area plan and adherence to applicable laws and regulations. Again, much of this section comes from 2 C.F.R. 200.332, including that the AAA must have documents available for inspection, and that the Department must provide audit findings to the AAA, develop a plan for corrective action, and follow-up to ensure deficiencies have been corrected. Section 1005 describes the Department's ongoing monitoring responsibilities of AAAs. Per all of the above cited regulations, the Department has the authority and

responsibility to monitor an AAA's fiscal and programmatic performance, identify deficiencies, and require corrective action, as outlined in this section. Section 1006 provides that the Department may conduct "special reviews" of an AAA to address areas of specific concern. Certainly, the power to monitor an AAA for compliance includes the power to monitor any specific concerns, and 2 C.F.R. 200.332 requires monitoring the sub-recipient "as necessary" to ensure compliance. Section 1007 summarizes the responsibility of AAAs for conducting evaluations of activities carried out under its area plan. This includes evaluating service providers for adherence to the area plan requirements, as well as evaluating the service providers' risk of noncompliance with state and federal statutes and regulations. Per 89 III. Admin. Code § 230.150 (b)(4), AAAs are required to periodically monitor and evaluate the performance of all service providers under the area plan. Per 2 C.F.R. 200.332, AAAs have a responsibility to monitor their own subrecipients for compliance with federal regulations and the terms and conditions of the subaward. As this review illustrates, the elements of Section 1000 are either summaries of federal and state regulations, internal operating procedures, or requirements that are well within the scope of federal regulations or already promulgated rules of the Illinois Administrative Code. As such, it is not necessary for the Department to submit Section 1000 to the formal rulemaking process.

In its First Amended Complaint, NIAAA identifies seven requirements in Section 1000 that it contends are not mandated by federal law where the Department has exercised discretion, thus triggering the rulemaking requirement. It first cites to §

1007(A)(1), which states that "Area Agencies on Aging will develop and use systematic procedures and an instrument for conducting subgrantee and subcontractor evaluations." Where the AAA already has a responsibility to monitor and evaluate its subgrantees and subcontractors, requiring that those evaluations to be done in a systematic way seems axiomatic and hardly an exercise in rulemaking. Next, NIAAA cites to § 1007(A)(2)(a), which requires that the evaluation instrument provide "a comprehensive on-site evaluation of sub grantees and/or subcontractors at least once during the Area Agency on Aging's area plan cycle." However, 2 C.F.R. § 200.332(d)(2) lists on-site reviews as one of the measures to be undertaken to detect deficiencies pertaining to the federal award. The Department's requirement that AAAs conduct one such on-site review per the area plan cycle is well within an AAAs already required duties per federal regulations. NIAAA also cites to § 1007(A)(2)(c), which requires the "submission of a written report of the Area Agency on Aging's findings to the subgrantees and/or subcontractors within a reasonable time period," but 2 C.F.R. § 200.332(d)(3) requires that written findings be provided to subrecipients. NIAAA points to § 1007(C), which requires that AAAs maintain documentation of all reviews and monitoring, but 2 C.F.R. § 200.334 requires retention of documents.

NIAAA next complains of § 1004(C)(1)(c), which provides that "if needed, the Area Agency on Aging will develop and implement a work plan to ensure that the Area Agency on Aging carries out recommended corrective action in a timely manner." Corrective action is not discretionary per 2 C.F.R. § 200.332(d)(2), which requires follow-up to ensure

that the subrecipient takes remedial action on deficiencies identified during a review. Requiring AAAs to come up with a plan to correct any deficiencies would hardly seem to require the promulgation of an additional rule. Finally, NIAAA, citing generally to Sections 1002 to 1006 and specifically to § 1003(B)(1), asserts that mandating that AAAs comply with the Department's risk assessments, evaluations, on-site evaluations, monitoring, and special reviews is a discretionary act on the part of the Department. Clearly, the federal and state regulations cited above mandate that AAAs comply with such monitoring and evaluations, and hence requiring compliance is not a discretionary act by the Department.

Tracking Email

On August 5, 2020, the Department's Regional Coordinator sent an email to the AAAs instructing them to track the reopening of senior centers in their areas which had been closed due to the pandemic, as well as any subsequent re-closures, and to submit reports on a weekly basis until further notice. In Count III, NIAAA alleges that this constitutes a rule that must be adopted through the rule making process mandated by the APA. The Department brings a 2-615 Motion to Dismiss this Count, contending that NIAAA cannot state a claim for declaratory relief because this email is not a rule, but rather a minor administrative task that is part of NIAAA's responsibility to administer its area plan.

The court agrees with the Department. Per 89 Ill. Admin Code § 230.150(a)(1), AAAs are already required to "monitor ... all ... programs and community actions which affect older persons."

Certainly, the opening and closing of senior centers during the pandemic is a program or community action which affects older persons. Not only is the Regional Coordinator's instruction a minor administrative task, it is well within the scope of an AAA's duties per the already promulgated rules of the Illinois Administrative Code.

The suggestion that before the Department can require an AAA to do even the most minor administrative task, it must first engage in the rulemaking process seems unreasonable. Although there is little case law examining what dictates rise to the level of a rule, it seems to the court that administrative agencies could hardly perform their statutory functions if something as minor as this email requiring tracking of the operational status of senior centers is defined as a rule which must undergo the formal rulemaking process. As one federal court addressing a minor change in administrative procedures noted: "We do not subscribe to the edict that every administrative proclamation, fiat, or decree constitutes a rule mandating the rigors of [notice and comment rulemaking] . . . We would foresee aeons of rulemaking proceedings when all the agency seeks to do is operate in a rational manner." United States Dept. of Labor v. Kast Metals Corp., 744 F.2d 1145, 1156 (5th Circuit 1984).

Conflict of Interest Memorandum and Form

On July 22, 2020, the State Long Term Care Ombudsman sent a memorandum to Ombudsman Provider Agencies and AAAs instructing them to complete an attached conflict of interest form on an annual basis. In Count IV, NIAAA alleges that this

requirement is a rule that must be adopted through the rulemaking process, it has not been so adopted, and therefore it constitutes an invalid rule. The Department brings a 2-615 Motion to Dismiss this Count, contending that NIAAA cannot state a claim for declaratory relief because the reporting of conflicts of interest is required by federal law, and thus this mandate is exempt from the rulemaking process.

The Long Term Care Ombudsman advocates for residents of long term care facilities and participants in home-care and community care programs. The Ombudsman is appointed by the Director of the Department on Aging, but operates independently from the Department. The Ombudsman designates regional long term care ombudsman programs. These are funded through the AAAs, which receive grants of OAA funds designated for the Ombudsman Program.

The Code of Federal Regulations clearly requires the Long Term Care Ombudsman to identify all conflicts of interest in any agency carrying out the Ombudsman program and remove or remedy them. 45 C.F.R. § 1324.21. Where the state agency carries out the Ombudsman program through a public agency or non-profit private organization (as in the case of NIAAA), the state agency must establish a process for periodic review and identification of conflicts, and require that the organization have a process in place to take steps to avoid conflicts, disclose identified conflicts, and remove conflicts. Id. The Ombudsman must disclose all conflicts of interest and steps taken to remove or remedy them in its annual report to the Federal Government. Id. Per 89 Ill. Admin. Code 270.130, AAAs and provider agencies must be free from conflicts of interest. The Ombudsman must report all

conflicts and remedial measures in its annual report through the federal National Ombudsman Reporting System. Id. Thus, there is no question that AAAs are mandated by both federal law and appropriately promulgated administrative rules to identify, report and remediate conflicts of interest, which is exactly what is required by the Ombudsman's memorandum and accompanying form. Consequently, there is no requirement that this directive from the Ombudsman undergo formal rulemaking.

In its First Amended Complaint, NIAAA alleges that the Department exercised discretion in issuing the "conflicts rule," contending it includes policies that are not required by federal law, and thus the exemption found in 20 ILCS 105/5.02 does not apply. It cites to these statements found in the Ombudsman's memorandum and form: "Each Ombudsman Provider Agency and each Area Agency on Aging must complete the Organizational Conflict of Interest Form on an annual basis," and "Failure to disclose a possible conflict of interest may be grounds for removal of designation." The first statement is well within the scope of the Code of Federal Regulations. Per 45 C.F.R. § 1324.21(4), the state agency must establish a process for periodic review and identification of conflicts, require the subagency (NIAAA) to disclose identified conflicts to the state agency, and report on such conflicts on an annual basis. None of these requirements are discretionary. Thus, requiring AAAs to submit a conflicts form on an annual basis is within this mandate by the Federal Government. As for the Ombudsman's edict that a failure to disclose a possible conflict of interest may be grounds for removal of designation, 89 Ill. Adm. Code 270.140 provides that an ongoing failure of an AAA to

meet any requirements of a substantive federal or state statute, rule or regulation is grounds for the withdrawal of AAA designation. Nondisclosure of a conflict of interest would be just such a failure.

Mandatory Medicaid Application and Redetermination for CCP Participants and Report of Substantiation Policy Clarification

In Count V, NIAAA alleges that on July 1, 2019, the Department issued a rule regarding mandatory Medicaid application, enrollment and redetermination for Community Care Program (CCP) participants which was not promulgated per the rulemaking process and is thus invalid. The CCP, through Care Coordination Units (CCUs), provides in-home and community based services to help seniors stay in their homes. Seniors do not need to be eligible for Medicaid to participate in the program, but in order to make certain that the program receives all available Medicaid funds, the Department instructed CCUs to ensure that eligible participants apply for Medicaid. In Count VI, NIAAA alleges that the memorandum issued by the Department on July 29, 2020, entitled Report of Substantiation (ROS) Policy Clarification, is a rule that was not promulgated per rulemaking procedures and is thus invalid. In the memorandum, the Department directs Adult Protective Services (APS) Provider Agencies to confirm the current service provider for seniors who are the subject of a report of abuse or neglect in order to ensure that the current provider of services receives the ROS rather than a previous provider.

The Department brings a 2-619 Motion to Dismiss both Counts, contending that NIAAA does not have standing to challenge these purported rules because it is not a CCU or an APS provider agency, and thus is not subject to them. NIAAA acknowledges that it is not a CCU or an APS Provider Agency, but contends that it has standing to challenge them nonetheless because (1) the APA does not have an explicit standing requirement, (2) NIAAA has been granted special legal status as "public advocate" for older adults and is authorized by state and federal law to bring litigation on behalf of older adults for the Department's illegal conduct, and (3) NIAAA contracts with the Department to manage the CCP and APS programs.

The doctrine of standing requires that a party have a real interest in the action brought and its outcome. Estate of Wellman, 174 I11.2d 335, 345 (1996). Standing is not a mere procedural technicality, but rather is a component of justiciability and a prerequisite to bringing any claim. Id. The purpose of standing is to ensure that courts are deciding actual controversies. Id. To have standing, a party must suffer some injury in fact to a legally recognized interest. Id. at 345. A party must assert its own legal rights and interests rather than assert a claim for relief based upon the rights of third parties. Powell v. Dean Foods, 2012 IL 111714, ¶36.

In Pre-School Owners Association of Illinois v. Department of Children and Family Services, the court considered whether plaintiffs had standing to challenge a particular regulation that had been promulgated by DCFS under the Child Care Act. The regulation barred individuals determined to have been perpetrators of child abuse from having contact with

children being cared for in a day care center. The plaintiffs, an association of day care centers, contended that the regulation was unconstitutionally vague and violative of due process. The court found that the plaintiffs lacked standing to challenge the regulation because they had not been subjected to it, nor were they in imminent danger of harm from its operation. The court held that to have standing to challenge the regulation, "a party must have sustained, or be in immediate danger of sustaining, a direct injury as a result of the enforcement of the challenged statute." 119 111.2d 268, 286-87 (1988).

It is the same in the instant case. NIAAA is not required to comply with either the changes to the CCP Medicaid application policy or the ROS policy clarification. Those directives are aimed at CCUs and APS provider agencies, and it is the CCUs that must assist and make sure that eligible participants apply for Medicaid and the APS provider agencies that must send the ROS to the current provider of services. These directives do not require anything of NIAAA, nor has the Department taken any action against NIAAA for failing to follow these directives. NIAAA clearly has not sustained, nor is it in danger of sustaining, a direct injury as a result of the enforcement of these directives. Consequently, NIAAA lacks standing to raise the claims asserted in Counts V and VI.

NIAAA's contention that it has standing because the APA does not have an explicit standing requirement to challenge an improper rule is mistaken. Statutes may grant standing to certain classes of individuals, see for example 750 ILCS 5/607(a-5)(1), but the fact that a statute does not explicitly address standing

does not mean that the standing doctrine does not apply. As the discussion above makes clear, standing is a threshold issue and is dependent upon the impact the regulation has on NIAAA. Likewise, NIAAA's contention that is has been given special legal status to advocate for older adults and is authorized by state and federal law to bring litigation on behalf of older adults for the Department's illegal conduct is incorrect. NIAAA cites to 45 C.F.R. § 1321.61(a) and (b)(1) and 89 Ill. Admin. Code § 230.150(-(3) for this proposition. That federal regulation provides that AAAs shall serve as public advocates for the development of community-based services, and shall "monitor, evaluate, and, where appropriate, comment on all policies, programs, hearings, levies, and community actions which affect older persons." The Illinois administrative regulation mimics this language and adds that AAAs shall "represent the interests of older persons to public officials, public and private agencies or organizations." Noticeably absent is any mention of the power to bring litigation on behalf of older adults. These regulations in no way confer upon NIAAA some special legal standing to bring causes of action before the judicial branch to challenge administrative rules that do not affect it directly. Finally, NIAAA's claim that because it contracts with the Department to manage the CCP and APS programs, it has standing to challenge these directives aimed at CCUs and APS provider agencies is also flawed. The fact that it manages these programs does not make it subject to these directives. It simply is not the entity that must comply with them. NIAAA has not alleged any action that it must undertake in order to comply with these directives, nor has it alleged any harm it would suffer if it did not abide by these directives.

Conclusion

For the reasons stated, the Department's 2-615 Motion to Dismiss Counts I, II, III and IV is granted. Because the court finds that no set of facts could be alleged that would entitle NIAAA to declaratory relief on these counts, and because NIAAA has already been given one opportunity to amend its Complaint, these counts are dismissed with prejudice. See, Vogt v. Round Robin Enterprises, Inc. 2020 IL App (4th) 190294, ¶ 29. The Department's 2-619 Motion to Dismiss Counts V and VI is granted with prejudice. This Memorandum Opinion shall stand as the Order of the Court. All future court dates are stricken.

Entered: 4-7-21

s/ Lisa R. Fabiano
Lisa R. Fabiano Circuit Judge

ILLINOIS APPELLATE COURT
SECOND DISTRICT
55 SYMPHONY WAY
ELGIN, IL 60120
(847) 695-3750

July 28, 2022

Timothy Scordato
Northwestern Illinois Area Agency on Aging
1111 S. Alpine Road, Suite 600
Rockford, IL 61108

RE: Northwestern Illinois Area Agency on Aging v. Basta, Paula Appeal No.: 2-21-0234
County: Winnebago County
Trial Court No.: 20MR38

The court today denied the petition for rehearing and certification filed in the above cause. The mandate of this court will issue 35 days from today unless otherwise ordered by this court or a petition for leave to appeal is filed in the Illinois Supreme Court.

If the decision is an opinion, it is hereby released today for publication.

Honorable Susan Fayette Hutchinson Honorable Donald C. Hudson
Honorable George Bridges

/s Jeffrey H. Kaplan
Jeffrey H. Kaplan Clerk of the Court

cc: Carson Reid Griffis

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Case No.: 2020-MR-0000038
Date: 7/30/2020 9:50 AM
By: J P, Deputy

IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT WINNEBAGO COUNTY, ILLINOIS

Case No. 2020 MR 00038

NORTHWESTERN ILLINOIS AREA AGENCY ON AGING,

Plaintiff,

v.

PAULA BASTA, in her capacity as Director of the Illinois Department on Aging,

Defendant.

~~AGREED~~ ORDER

This matter comes before the Court for hearing on Defendant's Motion to Dismiss. The Court has considered the written and oral arguments of the Parties and is fully advised. IT IS HEREBY ORDERED:

1. Count I is dismissed without prejudice for the reasons stated on the record;

2. Count II is dismissed without prejudice for the reasons stated on the record;

3. Count III is dismissed with prejudice for the reasons stated on the record;

4. Plaintiff is given leave to file an amended complaint on or before August 19, 2020;

5. Defendant shall answer or otherwise plead on or before September 16, 2020; and

6. This matter is set for status on the virtual call on September 30, 2020 at 10:30 a.m.

Prepared by:
Katherine Snitzer
Assistant Attorney General
Office of the Attorney General
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Chicago, Illinois 60601
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Dated: 7/30/2020
Judge: s/ Lisa Fabiano

No. 2020-MR-38
STATE OF ILLINOIS IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT COUNTY OF WINNEBAGO

Northwestern Illinois Area Agency on Aging
Plaintiff,
v.
Paula Basta in her official capacity
Defendant.

ORDER

This Matter coming before the Court on October 14, 2020 on Plaintiff's Motion to Add Party. It is hereby ordered:

Plaintiff's Motion to Add Party is denied.

Enter: 10-14-20
Judge s/ Lisa Fabiano

42 U.S.C. § 3058g - State Long-Term Care Ombudsman program

(a) ESTABLISHMENT
(1) IN GENERAL In order to be eligible to receive an allotment under section 3058b of this title from funds appropriated under section 3058a of this title and made available to carry out this subpart, a State agency shall, in accordance with this section—
(A) establish and operate an Office of the State Long-Term Care Ombudsman; and
(B) carry out through the Office a State Long-Term Care Ombudsman program.
(2) OMBUDSMAN The Office shall be headed by an individual, to be known as the State Long-Term Care Ombudsman, who shall be selected from among individuals with expertise and experience in the fields of long-term care and advocacy.
The Ombudsman shall be responsible for the management, including the fiscal management, of the Office.
(3) FUNCTIONS The Ombudsman shall serve on a full-time basis, and shall, personally or through representatives of the Office—
(A) identify, investigate, and resolve complaints that—
(i) are made by, or on behalf of, residents, including residents with limited or no decisionmaking capacity and who have no known legal representative, and if such a resident is unable to communicate consent for an Ombudsman to work on a complaint directly involving the resident, the Ombudsman shall seek evidence to indicate what outcome the resident would have communicated (and, in the absence of evidence to the contrary, shall assume that the resident wishes to

have the resident's health, safety, welfare, and rights protected) and shall work to accomplish that outcome; and

(ii) relate to action, inaction, or decisions, that may adversely affect the health, safety, welfare, or rights of the residents (including the welfare and rights of the residents with respect to the appointment and activities of guardians and representative payees), of—

(I) providers, or representatives of providers, of long-term care services;

(II) public agencies; or

(III) health and social service agencies;

(B) provide services to assist the residents in protecting the health, safety, welfare, and rights of the residents;

(C) inform the residents about means of obtaining services provided by providers or agencies described in subparagraph (A)(ii) or services described in subparagraph (B);

(D) ensure that the residents have regular, timely, private, and unimpeded access to the services provided through the Office and that the residents and complainants receive timely responses from representatives of the Office to complaints;

(E) represent the interests of the residents before governmental agencies and seek administrative, legal, and other remedies to protect the health, safety, welfare, and rights of the residents;

(F) provide administrative and technical assistance to entities designated under paragraph (5) to assist the entities in participating in the program;

(G)

(i) analyze, comment on, and monitor the development and implementation of Federal, State,

and local laws, regulations, and other governmental policies and actions, that pertain to the health, safety, welfare, and rights of the residents, with respect to the adequacy of long-term care facilities and services in the State;
(ii) recommend any changes in such laws, regulations, policies, and actions as the Office determines to be appropriate; and
(iii) facilitate public comment on the laws, regulations, policies, and actions;
(H)
(i) provide for training representatives of the Office;
(ii) promote the development of citizen organizations, to participate in the program; and
(iii) provide technical support for, actively encourage, and assist in the development of resident and family councils to protect the well-being and rights of residents;
(I) when feasible, continue to carry out the functions described in this section on behalf of residents transitioning from a long-term care facility to a home care setting; and
(J) carry out such other activities as the Assistant Secretary determines to be appropriate.
(4)CONTRACTS AND ARRANGEMENTS
(A) In general
Except as provided in subparagraph (B), the State agency may establish and operate the Office, and carry out the program, directly, or by contract or other arrangement with any public agency or nonprofit private organization.
(B) Licensing and certification organizations; associations The State agency may not enter into the contract or other arrangement described in subparagraph (A) with—

(i) an agency or organization that is responsible for licensing or certifying long-term care services in the State; or
(ii) an association (or an affiliate of such an association) of long-term care facilities, or of any other residential facilities for older individuals.
(5) DESIGNATION OF LOCAL OMBUDSMAN ENTITIES AND REPRESENTATIVES
(A) Designation
In carrying out the duties of the Office, the Ombudsman may designate an entity as a local Ombudsman entity, and may designate an employee or volunteer to represent the entity.
(B) Duties An individual so designated shall, in accordance with the policies and procedures established by the Office and the State agency—
(i) provide services to protect the health, safety, welfare [1] and rights of residents;
(ii) ensure that residents in the service area of the entity have regular, timely access to representatives of the program and timely responses to complaints and requests for assistance;
(iii) identify, investigate, and resolve complaints made by or on behalf of residents that relate to action, inaction, or decisions, that may adversely affect the health, safety, welfare, or rights of the residents;
(iv) 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;
(v)
(I) review, and if necessary, comment on any existing and proposed laws, regulations, and other government policies and actions, that pertain to the rights and well-being of residents; and

(II) facilitate the ability of the public to comment on the laws, regulations, policies, and actions;
(vi) support, actively encourage, and assist in the development of resident and family councils;
(vii) identify, investigate, and resolve complaints described in clause (iii) that are made by or on behalf of residents with limited or no decision making capacity and who have no known legal representative, and if such a resident is unable to communicate consent for an Ombudsman to work on a complaint directly involving the resident, the Ombudsman shall seek evidence to indicate what outcome the resident would have communicated (and, in the absence of evidence to the contrary, shall assume that the resident wishes to have the resident's health, safety, welfare, and rights protected) and shall work to accomplish that outcome; and
(viii) carry out other activities that the Ombudsman determines to be appropriate.
(C) Eligibility for designation Entities eligible to be designated as local Ombudsman entities, and individuals eligible to be designated as representatives of such entities, shall—
(i) have demonstrated capability to carry out the responsibilities of the Office;
(ii) be free of conflicts of interest and not stand to gain financially through an action or potential action brought on behalf of individuals the Ombudsman serves;
(iii) in the case of the entities, be public or nonprofit private entities; and
(iv) meet such additional requirements as the Ombudsman may specify.
(D)Policies and procedures
(i) In general

The State agency shall establish, in accordance with the Office, policies and procedures for monitoring local Ombudsman entities designated to carry out the duties of the Office.

(ii)Policies

In a case in which the entities are grantees, or the representatives are employees, of area agencies on aging, the State agency shall develop the policies in consultation with the area agencies on aging. The policies shall provide for participation and comment by the agencies and for resolution of concerns with respect to case activity.

(iii)Confidentiality and disclosure

The State agency shall develop the policies and procedures in accordance with all provisions of this part regarding confidentiality and conflict of interest.

(E)Rule of construction for volunteer Ombudsman representatives

Nothing in this paragraph shall be construed as prohibiting the program from providing and financially supporting recognition for an individual designated under subparagraph (A) as a volunteer to represent the Ombudsman program, or from reimbursing or otherwise providing financial support to such an individual for any costs, such as transportation costs, incurred by the individual in serving as such volunteer.

(b)PROCEDURES FOR ACCESS

(1) IN GENERAL The State shall ensure that representatives of the Office shall have—

(A) private and unimpeded access to long-term care facilities and residents;

(B)

(i) appropriate access to review all files, records, and other information concerning a resident, if—

(I) the representative has the permission of the resident, or the legal representative of the resident; or
(II) the resident is unable to communicate consent to the review and has no legal representative; or
(ii) access to the files, records, and information as is necessary to investigate a complaint if—
(I) a legal guardian of the resident refuses to give the permission;
(II) a representative of the Office has reasonable cause to believe that the guardian is not acting in the best interests of the resident; and
(III) the representative obtains the approval of the Ombudsman;
(C) access to the administrative records, policies, and documents, to which the residents have, or the general public has access, of long-term care facilities; and
(D) access to and, on request, copies of all licensing and certification records maintained by the State with respect to long-term care facilities.
(2) PROCEDURES
The State agency shall establish procedures to ensure the access described in paragraph (1).
(3) HEALTH OVERSIGHT AGENCY
For purposes of section 264(c) of the Health Insurance Portability and Accountability Act of 1996 (including regulations issued under that section) (42 U.S.C. 1320d–2 note), the Ombudsman and a representative of the Office shall be considered a "health oversight agency," so that release of residents' individually identifiable health information to the Ombudsman or representative is not precluded in cases in which the requirements of clause (i) or (ii)

of paragraph (1)(B), or the requirements of paragraph (1)(D), are otherwise met.

(c) REPORTING SYSTEM The State agency shall establish a statewide uniform reporting system to—
(1) collect and analyze data relating to complaints and conditions in long-term care facilities and to residents for the purpose of identifying and resolving significant problems; and
(2) submit the data, on a regular basis, to—
(A) the agency of the State responsible for licensing or certifying long-term care facilities in the State;
(B) other State and Federal entities that the Ombudsman determines to be appropriate;
(C) the Assistant Secretary; and
(D) the National Ombudsman Resource Center established in section 3012(a)(18) of this title.

(d) DISCLOSURE
(1) IN GENERAL
The State agency shall establish procedures for the disclosure by the Ombudsman or local Ombudsman entities of files, records, and other information maintained by the program, including records described in subsection (b)(1) or (c).
(2) IDENTITY OF COMPLAINANT OR RESIDENT The procedures described in paragraph (1) shall—
(A) provide that, subject to subparagraph (B), the files, records, and other information described in paragraph (1) may be disclosed only at the discretion of the Ombudsman (or the person designated by the Ombudsman to disclose the files, records, and other information);
(B) prohibit the disclosure of the identity of any complainant or resident with respect to whom

the Office maintains such files, records, or other information unless—
(i) the complainant or resident, or the legal representative of the complainant or resident, consents to the disclosure and the consent is given in writing;
(ii)
(I) the complainant or resident gives consent orally; and
(II) the consent is documented contemporaneously in a writing made by a representative of the Office in accordance with such requirements as the State agency shall establish; or
(iii) the disclosure is required by court order; and
(C) notwithstanding subparagraph (B), ensure that the Ombudsman may disclose information as needed in order to best serve residents with limited or no decisionmaking capacity who have no known legal representative and are unable to communicate consent, in order for the Ombudsman to carry out the functions and duties described in paragraphs (3)(A) and (5)(B) of subsection (a).

(e) CONSULTATION
In planning and operating the program, the State agency shall consider the views of area agencies on aging, older individuals, and providers of long-term care.

(f) CONFLICT OF INTEREST
(1) INDIVIDUAL CONFLICT OF INTEREST The State agency shall—
(A) ensure that no individual, or member of the immediate family of an individual, involved in the designation of the Ombudsman (whether by appointment or otherwise) or the designation of an

entity designated under subsection (a)(5), is subject to a conflict of interest;
(B) ensure that no officer or employee of the Office, representative of a local Ombudsman entity, or member of the immediate family of the officer, employee, or representative, is subject to a conflict of interest; and
(C) ensure that the Ombudsman—
(i) does not have a direct involvement in the licensing or certification of a long-term care facility or of a provider of a long-term care service;
(ii) does not have an ownership or investment interest (represented by equity, debt, or other financial relationship) in a long-term care facility or a long-term care service;
(iii) is not employed by, or participating in the management of, a long-term care facility or a related organization, and has not been employed by such a facility or organization within 1 year before the date of the determination involved;
(iv) does not receive, or have the right to receive, directly or indirectly, remuneration (in cash or in kind) under a compensation arrangement with an owner or operator of a long-term care facility;
(v) does not have management responsibility for, or operate under the supervision of an individual with management responsibility for, adult protective services; and
(vi) does not serve as a guardian or in another fiduciary capacity for residents of long-term care facilities in an official capacity (as opposed to serving as a guardian or fiduciary for a family member, in a personal capacity).
(2) ORGANIZATIONAL CONFLICT OF INTEREST
(A) In general The State agency shall comply with subparagraph (B)(i) in a case in which

the Office poses an organizational conflict of interest, including a situation in which the Office is placed in an organization that—

(i) is responsible for licensing, certifying, or surveying long-term care services in the State;

(ii) is an association (or an affiliate of such an association) of long-term care facilities, or of any other residential facilities for older individuals;

(iii) provides long-term care services, including programs carried out under a Medicaid waiver approved under section 1115 of the Social Security Act (42 U.S.C. 1315) or under subsection (b) or (c) of section 1915 of the Social Security Act (42 U.S.C. 1396n), or under a Medicaid State plan amendment under subsection (i), (j), or (k) of section 1915 of the Social Security Act (42 U.S.C. 1396n);

(iv) provides long-term care case management;

(v) sets rates for long-term care services;

(vi) provides adult protective services;

(vii) is responsible for eligibility determinations for the Medicaid program carried out under title XIX of the Social Security Act (42 U.S.C. 1396 et seq.);

(viii) conducts preadmission screening for placements in facilities described in clause (ii); or

(ix) makes decisions regarding admission or discharge of individuals to or from such facilities.

(B) Identifying, removing, and remedying organizational conflict

(i) In general The State agency may not operate the Office or carry out the program, directly, or by contract or other arrangement with any public agency or nonprofit private organization, in a case in which there is an organizational conflict of interest (within the meaning of subparagraph (A)) unless such conflict of interest has been—

(I) identified by the State agency;

(II) disclosed by the State agency to the Assistant Secretary in writing; and
(III) remedied in accordance with this subparagraph.
(ii) Action by Assistant Secretary In a case in which a potential or actual organizational conflict of interest (within the meaning of subparagraph (A)) involving the Office is disclosed or reported to the Assistant Secretary by any person or entity, the Assistant Secretary shall require that the State agency, in accordance with the policies and procedures established by the State agency under subsection (a)(5)(D)(iii)—
(I) remove the conflict; or
(II) submit, and obtain the approval of the Assistant Secretary for, an adequate remedial plan that indicates how the Ombudsman will be unencumbered in fulfilling all of the functions specified in subsection (a)(3).

(g) LEGAL COUNSEL The State agency shall ensure that—
(1)
(A) adequate legal counsel is available, and is able, without conflict of interest, to—
(i) provide advice and consultation needed to protect the health, safety, welfare, and rights of residents; and
(ii) assist the Ombudsman and representatives of the Office in the performance of the official duties of the Ombudsman and representatives; and
(B) legal representation is provided to 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 the official duties of the Ombudsman or such a representative; and

(2) the Office pursues administrative, legal, and other appropriate remedies on behalf of residents.

(h) ADMINISTRATION The State agency shall require the Office to—
(1) prepare an annual report—
(A) describing the activities carried out by the Office in the year for which the report is prepared;
(B) containing and analyzing the data collected under subsection (c);
(C) evaluating the problems experienced by, and the complaints made by or on behalf of, residents;
(D) containing recommendations for—
(i) improving quality of the care and life of the residents; and
(ii) protecting the health, safety, welfare, and rights of the residents;
(E)
(i) analyzing the success of the program including success in providing services to residents of board and care facilities and other similar adult care facilities; and
(ii) identifying barriers that prevent the optimal operation of the program; and
(F) providing policy, regulatory, and legislative recommendations to solve identified problems, to resolve the complaints, to improve the quality of care and life of residents, to protect the health, safety, welfare, and rights of residents, and to remove the barriers;
(2) analyze, comment on, and monitor the development and implementation of Federal, State, and local laws, regulations, and other government policies and actions that pertain to long-term care facilities and services, and to the health, safety,

welfare, and rights of residents, in the State, and recommend any changes in such laws, regulations, and policies as the Office determines to be appropriate;

(3)

(A) provide such information as the Office determines to be necessary to public and private agencies, legislators, and other persons, regarding—

(i) the problems and concerns of individuals residing in long-term care facilities; and

(ii) recommendations related to the problems and concerns; and

(B) make available to the public, and submit to the Assistant Secretary, the chief executive officer of the State, the State legislature, the State agency responsible for licensing or certifying long-term care facilities, and other appropriate governmental entities, each report prepared under paragraph (1);

(4) ensure that the Ombudsman or a designee participates in training provided by the National Ombudsman Resource Center established in section 3012(a)(18) of this title;

(5) strengthen and update procedures for the training of the representatives of the Office, including unpaid volunteers, based on model standards established by the Director of the Office of Long-Term Care Ombudsman Programs, in consultation with representatives of citizen groups, long-term care providers, and the Office, that—

(A) specify a minimum number of hours of initial training;

(B) specify the content of the training, including training relating to—

(i) Federal, State, and local laws, regulations, and policies, with respect to long-term care facilities in the State;
(ii) investigative techniques; and
(iii) such other matters as the State determines to be appropriate; and
(C) specify an annual number of hours of in-service training for all designated representatives;
(6) prohibit any representative of the Office (other than the Ombudsman) from carrying out any activity described in subparagraphs (A) through (G) of subsection (a)(3) unless the representative—
(A) has received the training required under paragraph (5); and
(B) has been approved by the Ombudsman as qualified to carry out the activity on behalf of the Office;
(7) coordinate ombudsman services with the protection and advocacy systems for individuals with developmental disabilities and mental illnesses established under—
(A) subtitle C of title I of the Developmental Disabilities Assistance and Bill of Rights Act of 2000 [42 U.S.C. 15041 et seq.]; and
(B) the Protection and Advocacy for Mentally Ill Individuals Act of 1986 [2] (42 U.S.C. 10801 et seq.);
(8) coordinate, to the greatest extent possible, ombudsman services with legal assistance provided under section 3026(a)(2)(C) of this title, through adoption of memoranda of understanding and other means;
(9) coordinate services with State and local law enforcement agencies and courts of competent jurisdiction; and

(10) permit any local Ombudsman entity to carry out the responsibilities described in paragraph (1), (2), (3), (7), or (8).

(i) LIABILITY
The State shall ensure that no representative of the Office will be liable under State law for the good faith performance of official duties.

(j) NONINTERFERENCE The State shall—
(1) ensure that willful interference with representatives of the Office in the performance of the official duties of the representatives (as defined by the Assistant Secretary) shall be unlawful;
(2) prohibit retaliation and reprisals by a long-term care facility or other entity with respect to any resident, employee, or other person for filing a complaint with, providing information to, or otherwise cooperating with any representative of, the Office; and
(3) provide for appropriate sanctions with respect to the interference, retaliation, and reprisals.

45 C.F.R. § 1321.61 - Advocacy responsibilities of the area agency

(a) The area agency shall serve as the public advocate for the development or enhancement of comprehensive and coordinated community-based systems of services in each community throughout the planning and service area.

(b) In carrying out this responsibility, the area agency shall:

(1) Monitor, evaluate, and, where appropriate, comment on all policies, programs, hearings, levies, and community actions which affect older persons;

(2) Solicit comments from the public on the needs of older persons;

(3) Represent the interests of older persons to local level and executive branch officials, public and private agencies or organizations;

(4) Consult with and support the State's long-term care ombudsman program; and

(5) Undertake on a regular basis activities designed to facilitate the coordination of plans and activities with all other public and private organizations, including units of general purpose local government, with responsibilities affecting older persons in the planning and service area to promote new or expanded benefits and opportunities for older persons; and

(c) Each area agency on aging shall undertake a leadership role in assisting communities throughout the planning and service area to target resources from all appropriate sources to meet the needs of older persons with greatest economic or social need, with particular attention to low income minority individuals. Such activities may include location of services and specialization in the types of services must needed by these groups to meet this requirement. However, the area agency may not permit a grantee or contractor under this part to employ a means test for services funded under this part.

(d) No requirement in this section shall be deemed to supersede a prohibition contained in the Federal appropriation on the use of Federal funds to lobby the Congress; or the lobbying provision applicable to private nonprofit agencies and organizations contained in OMB Circular A-122.

45 C.F.R. § 1324.11 Establishment of the Office of the State Long-Term Care Ombudsman.

(a) The Office of the State Long-Term Care Ombudsman shall be an entity which shall be headed by the State Long-Term Care Ombudsman, who shall carry out all of the functions and responsibilities set forth in § 1324.13 and shall carry out, directly and/or through local Ombudsman entities, the duties set forth in § 1324.19.

(b) The State agency shall establish the Office and, thereby carry out the Long-Term Care Ombudsman program in any of the following ways:

(1) The Office is a distinct entity, separately identifiable, and located within or connected to the State agency; or

(2) The State agency enters into a contract or other arrangement with any public agency or nonprofit organization which shall establish a separately identifiable, distinct entity as the Office.

(c) The State agency shall require that the Ombudsman serve on a full-time basis. In providing leadership and management of the Office, the functions, responsibilities, and duties, as set forth in §§ 1324.13 and 1324.19 are to constitute the entirety of the Ombudsman's work. The State

agency or other agency carrying out the Office shall not require or request the Ombudsman to be responsible for leading, managing or performing the work of non-ombudsman services or programs except on a time-limited, intermittent basis.

(1) This provision does not limit the authority of the Ombudsman program to provide ombudsman services to populations other than residents of long-term care facilities so long as the appropriations under the Act are utilized to serve residents of long-term care facilities, as authorized by the Act.

(2) [Reserved]

(d) The State agency, and other entity selecting the Ombudsman, if applicable, shall ensure that the Ombudsman meets minimum qualifications which shall include, but not be limited to, demonstrated expertise in:

(1) Long-term services and supports or other direct services for older persons or individuals with disabilities;

(2) Consumer-oriented public policy advocacy;

(3) Leadership and program management skills; and

(4) Negotiation and problem resolution skills.

(e) ***Policies and procedures.*** Where the Ombudsman has the legal authority to do so, he or she shall establish policies and procedures, in consultation with the State agency, to carry out the Ombudsman program in accordance with the Act. Where State law does not provide the Ombudsman with legal authority to establish policies and

procedures, the Ombudsman shall recommend policies and procedures to the State agency or other agency in which the Office is organizationally located, and such agency shall establish Ombudsman program policies and procedures. Where local Ombudsman entities are designated within area agencies on aging or other entities, the Ombudsman and/or appropriate agency shall develop such policies and procedures in consultation with the agencies hosting local Ombudsman entities and with representatives of the Office. The policies and procedures must address the matters within this subsection.

(1) ***Program administration.*** Policies and procedures regarding program administration must include, but not be limited to:

(i) A requirement that the agency in which the Office is organizationally located must not have personnel policies or practices which prohibit the Ombudsman from performing the functions and responsibilities of the Ombudsman, as set forth in § 1324.13, or from adhering to the requirements of section 712 of the Act. Nothing in this provision shall prohibit such agency from requiring that the Ombudsman, or other employees or volunteers of the Office, adhere to the personnel policies and procedures of the entity which are otherwise lawful.

(ii) A requirement that an agency hosting a local Ombudsman entity must not have personnel policies or practices which prohibit a representative of the Office from performing the duties of the Ombudsman program or from adhering to the requirements of section 712

of the Act. Nothing in this provision shall prohibit such agency from requiring that representatives of the Office adhere to the personnel policies and procedures of the host agency which are otherwise lawful.

(iii) A requirement that the Ombudsman shall monitor the performance of local Ombudsman entities which the Ombudsman has designated to carry out the duties of the Office.

(iv) A description of the process by which the agencies hosting local Ombudsman entities will coordinate with the Ombudsman in the employment or appointment of representatives of the Office.

(v) Standards to assure prompt response to complaints by the Office and/or local Ombudsman entities which prioritize abuse, neglect, exploitation and time-sensitive complaints and which consider the severity of the risk to the resident, the imminence of the threat of harm to the resident, and the opportunity for mitigating harm to the resident through provision of Ombudsman program services.

(vi) Procedures that clarify appropriate fiscal responsibilities of the local Ombudsman entity, including but not limited to clarifications regarding access to programmatic fiscal information by appropriate representatives of the Office.

(2) ***Procedures for access.*** Policies and procedures regarding timely access to facilities, residents, and appropriate records (regardless of

format and including, upon request, copies of such records) by the Ombudsman and representatives of the Office must include, but not be limited to:

(i) Access to enter all long-term care facilities at any time during a facility's regular business hours or regular visiting hours, and at any other time when access may be required by the circumstances to be investigated;

(ii) Access to all residents to perform the functions and duties set forth in §§ 1324.13 and 1324.19;

(iii) Access to the name and contact information of the resident representative, if any, where needed to perform the functions and duties set forth in §§ 1324.13 and 1324.19;

(iv) Access to review the medical, social and other records relating to a resident, if -

(A) The resident or resident representative communicates informed consent to the access and the consent is given in writing or through the use of auxiliary aids and services;

(B) The resident or resident representative communicates informed consent orally, visually, or through the use of auxiliary aids and services, and such consent is documented contemporaneously by a representative of the Office in accordance with such procedures; and

(C) Access is necessary in order to investigate a complaint, the resident representative refuses to consent to the access,

a representative of the Office has reasonable cause to believe that the resident representative is not acting in the best interests of the resident, and the representative of the Office obtains the approval of the Ombudsman;

(v) Access to the administrative records, policies, and documents, to which the residents have, or the general public has access, of long-term care facilities;

(vi) Access of the Ombudsman to, and, upon request, copies of all licensing and certification records maintained by the State with respect to long-term care facilities; and

(vii) Reaffirmation that the Health Insurance Portability and Accountability Act of 1996 (HIPAA) Privacy Rule, 45 CFR part 160 and 45 CFR part 164, subparts A and E, does not preclude release by covered entities of resident private health information or other resident identifying information to the Ombudsman program, including but not limited to residents' medical, social, or other records, a list of resident names and room numbers, or information collected in the course of a State or Federal survey or inspection process.

(3) ***Disclosure.*** Policies and procedures regarding disclosure of files, records and other information maintained by the Ombudsman program must include, but not be limited to:

(i) Provision that the files, records, and information maintained by the Ombudsman

program may be disclosed only at the discretion of the Ombudsman or designee of the Ombudsman for such purpose and in accordance with the criteria developed by the Ombudsman, as required by § 1324.13(e);

(ii) Prohibition of the disclosure of identifying information of any resident with respect to whom the Ombudsman program maintains files, records, or information, except as otherwise provided by § 1324.19(b)(5) through (8), unless:

(A) The resident or the resident representative communicates informed consent to the disclosure and the consent is given in writing or through the use of auxiliary aids and services;

(B) The resident or resident representative communicates informed consent orally, visually, or through the use of auxiliary aids and services and such consent is documented contemporaneously by a representative of the Office in accordance with such procedures; or

(C) The disclosure is required by court order;

(iii) Prohibition of the disclosure of identifying information of any complainant with respect to whom the Ombudsman program maintains files, records, or information, unless:

(A) The complainant communicates informed consent to the disclosure and the consent is given in writing or through the use of auxiliary aids and services;

(B) The complainant communicates informed consent orally, visually, or through the use of auxiliary aids and services and such consent is documented contemporaneously by a representative of the Office in accordance with such procedures; or

(C) The disclosure is required by court order;

(iv) Exclusion of the Ombudsman and representatives of the Office from abuse reporting requirements, including when such reporting would disclose identifying information of a complainant or resident without appropriate consent or court order, except as otherwise provided in § 1324.19(b)(5) through (8); and

(v) Adherence to the provisions of paragraph (e)(3) of this section, regardless of the source of the request for information or the source of funding for the services of the Ombudsman program, notwithstanding section 705(a)(6)(c) of the Act.

(4) ***Conflicts of interest.*** Policies and procedures regarding conflicts of interest must establish mechanisms to identify and remove or remedy conflicts of interest as provided in § 1324.21, including:

(i) Ensuring that no individual, or member of the immediate family of an individual, involved in the employment or appointment of the Ombudsman is subject to a conflict of interest;

(ii) Requiring that other agencies in which the Office or local Ombudsman entities are organizationally located have policies in place to prohibit the employment or appointment of an

Ombudsman or representatives of the Office with a conflict that cannot be adequately removed or remedied;

(iii) Requiring that the Ombudsman take reasonable steps to refuse, suspend or remove designation of an individual who has a conflict of interest, or who has a member of the immediate family with a conflict of interest, which cannot be adequately removed or remedied;

(iv) Establishing the methods by which the Office and/or State agency will periodically review and identify conflicts of the Ombudsman and representatives of the Office; and

(v) Establishing the actions the Office and/or State agency will require the Ombudsman or representatives of the Office to take in order to remedy or remove such conflicts.

(5) ***Systems advocacy.*** Policies and procedures related to systems advocacy must assure that the Office is required and has sufficient authority to carry out its responsibility to analyze, comment on, and monitor the development and implementation of Federal, State, and local laws, regulations, and other government policies and actions that pertain to long-term care facilities and services and to the health, safety, welfare, and rights of residents, and to recommend any changes in such laws, regulations, and policies as the Office determines to be appropriate.

(i) Such procedures must exclude the Ombudsman and representatives of the Office

from any State lobbying prohibitions to the extent that such requirements are inconsistent with section 712 of the Act.

(ii) Nothing in this part shall prohibit the Ombudsman or the State agency or other agency in which the Office is organizationally located from establishing policies which promote consultation regarding the determinations of the Office related to recommended changes in laws, regulations, and policies. However, such a policy shall not require a right to review or pre-approve positions or communications of the Office.

(6) ***Designation.*** Policies and procedures related to designation must establish the criteria and process by which the Ombudsman shall designate and refuse, suspend or remove designation of local Ombudsman entities and representatives of the Office.

(i) Such criteria should include, but not be limited to, the authority to refuse, suspend or remove designation a local Ombudsman entity or representative of the Office in situations in which an identified conflict of interest cannot be adequately removed or remedied as set forth in § 1324.21.

(ii) [Reserved]

(7) ***Grievance process.*** Policies and procedures related to grievances must establish a grievance process for the receipt and review of grievances regarding the determinations or actions of the Ombudsman and representatives of the Office.

(i) Such process shall include an opportunity for reconsideration of the Ombudsman decision to refuse, suspend, or remove designation of a local Ombudsman entity or representative of the Office. Notwithstanding the grievance process, the Ombudsman shall make the final determination to designate or to refuse, suspend, or remove designation of a local Ombudsman entity or representative of the Office.

(ii) [Reserved]

(8) ***Determinations of the Office.*** Policies and procedures related to the determinations of the Office must ensure that the Ombudsman, as head of the Office, shall be able to independently make determinations and establish positions of the Office, without necessarily representing the determinations or positions of the State agency or other agency in which the Office is organizationally located, regarding:

(i) Disclosure of information maintained by the Ombudsman program within the limitations set forth in section 712(d) of the Act;

(ii) Recommendations to changes in Federal, State and local laws, regulations, policies and actions pertaining to the health, safety, welfare, and rights of residents; and

(iii) Provision of information to public and private agencies, legislators, the media, and other persons, regarding the problems and concerns of residents and recommendations related to the problems and concerns.

45 C.F.R. § 1324.13 Functions and responsibilities of the State Long-Term Care Ombudsman.

The Ombudsman, as head of the Office, shall have responsibility for the leadership and management of the Office in coordination with the State agency, and, where applicable, any other agency carrying out the Ombudsman program, as follows.

(a) ***Functions.*** The Ombudsman shall, personally or through representatives of the Office -

(1) Identify, investigate, and resolve complaints that -

(i) Are made by, or on behalf of, residents; and

(ii) Relate to action, inaction, or decisions, that may adversely affect the health, safety, welfare, or rights of residents (including the welfare and rights of residents with respect to the appointment and activities of resident representatives) of -

(A) Providers, or representatives of providers, of long-term care;

(B) Public agencies; or

(C) Health and social service agencies.

(2) Provide services to protect the health, safety, welfare, and rights of the residents;

(3) Inform residents about means of obtaining services provided by the Ombudsman program;

(4) Ensure that residents have regular and timely access to the services provided through the Ombudsman program and that residents and complainants receive timely responses from

representatives of the Office to requests for information and complaints;

(5) Represent the interests of residents before governmental agencies, assure that individual residents have access to, and pursue (as the Ombudsman determines as necessary and consistent with resident interests) administrative, legal, and other remedies to protect the health, safety, welfare, and rights of residents;

(6) Provide administrative and technical assistance to representatives of the Office and agencies hosting local Ombudsman entities;

(7)

(i) Analyze, comment on, and monitor the development and implementation of Federal, State, and local laws, regulations, and other governmental policies and actions, that pertain to the health, safety, welfare, and rights of the residents, with respect to the adequacy of long-term care facilities and services in the State;

(ii) Recommend any changes in such laws, regulations, policies, and actions as the Office determines to be appropriate; and

(iii) Facilitate public comment on the laws, regulations, policies, and actions;

(iv) Provide leadership to statewide systems advocacy efforts of the Office on behalf of long-term care facility residents, including coordination of systems advocacy efforts carried out by representatives of the Office; and

(v) Provide information to public and private agencies, legislators, the media, and other persons, regarding the problems and concerns of residents and recommendations related to the problems and concerns.

(vi) Such determinations and positions shall be those of the Office and shall not necessarily represent the determinations or positions of the State agency or other agency in which the Office is organizationally located.

(vii) In carrying out systems advocacy efforts of the Office on behalf of long-term care facility residents and pursuant to the receipt of grant funds under the Act, the provision of information, recommendations of changes of laws to legislators, and recommendations of changes of regulations and policies to government agencies by the Ombudsman or representatives of the Office do not constitute lobbying activities as defined by 45 CFR part 93.

(8) Coordinate with and promote the development of citizen organizations consistent with the interests of residents; and

(9) Promote, provide technical support for the development of, and provide ongoing support as requested by resident and family councils to protect the well-being and rights of residents; and

(b) The Ombudsman shall be the head of a unified statewide program and shall:

(1) Establish or recommend policies, procedures and standards for administration of the Ombudsman program pursuant to § 1324.11(e);

(2) Require representatives of the Office to fulfill the duties set forth in § 1324.19 in accordance with Ombudsman program policies and procedures.

(c) ***Designation.*** The Ombudsman shall determine designation, and refusal, suspension, or removal of designation, of local Ombudsman entities and representatives of the Office pursuant to section 712(a)(5) of the Act and the policies and procedures set forth in § 1324.11(e)(6).

(1) Where an Ombudsman chooses to designate local Ombudsman entities, the Ombudsman shall:

(i) Designate local Ombudsman entities to be organizationally located within public or non-profit private entities;

(ii) Review and approve plans or contracts governing local Ombudsman entity operations, including, where applicable, through area agency on aging plans, in coordination with the State agency; and

(iii) Monitor, on a regular basis, the Ombudsman program performance of local Ombudsman entities.

(2) ***Training requirements.*** The Ombudsman shall establish procedures for training for certification and continuing education of the representatives of the Office, based on model standards established by the Director of the Office of Long-Term Care Ombudsman Programs as described in section 201(d) of the Act, in consultation with residents, resident representatives, citizen organizations, long-term care providers, and the State agency, that -

(i) Specify a minimum number of hours of initial training;

(ii) Specify the content of the training, including training relating to Federal, State, and local laws, regulations, and policies, with respect to long-term care facilities in the State; investigative and resolution techniques; and such other matters as the Office determines to be appropriate; and

(iii) Specify an annual number of hours of in-service training for all representatives of the Office;

(3) Prohibit any representative of the Office from carrying out the duties described in § 1324.19 unless the representative -

(i) Has received the training required under paragraph (c)(2) of this section or is performing such duties under supervision of the Ombudsman or a designated representative of the Office as part of certification training requirements; and

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

(4) The Ombudsman shall investigate allegations of misconduct by representatives of the Office in the performance of Ombudsman program duties and, as applicable, coordinate such investigations with the State agency in which the Office is organizationally located, agency hosting the local Ombudsman entity and/or the local Ombudsman entity.

(5) Policies, procedures, or practices which the Ombudsman determines to be in conflict with the laws, policies, or procedures governing the Ombudsman program shall be sufficient grounds for refusal, suspension, or removal of designation of the representative of the Office and/or the local Ombudsman entity.

(d) ***Ombudsman program information.*** The Ombudsman shall manage the files, records, and other information of the Ombudsman program, whether in physical, electronic, or other formats, including information maintained by representatives of the Office and local Ombudsman entities pertaining to the cases and activities of the Ombudsman program. Such files, records, and other information are the property of the Office. Nothing in this provision shall prohibit a representative of the Office or a local Ombudsman entity from maintaining such information in accordance with Ombudsman program requirements.

(e) ***Disclosure.*** In making determinations regarding the disclosure of files, records and other information maintained by the Ombudsman program, the Ombudsman shall:

(1) Have the sole authority to make or delegate determinations concerning the disclosure of the files, records, and other information maintained by the Ombudsman program. The Ombudsman shall comply with section 712(d) of the Act in responding to requests for disclosure of files, records, and other information, regardless of the format of such file, record, or other information, the source of the request, and the sources of funding to the Ombudsman program;

(2) 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; and

(3) Develop and adhere to a process for the appropriate disclosure of information maintained by the Office, including:

(i) Classification of at least the following types of files, records, and information: medical, social and other records of residents; administrative records, policies, and documents of long-term care facilities; licensing and certification records maintained by the State with respect to long-term care facilities; and data collected in the Ombudsman program reporting system; and

(ii) Identification of the appropriate individual designee or category of designee, if other than the Ombudsman, authorized to determine the disclosure of specific categories of information in accordance with the criteria described in paragraph (e) of this section.

(f) ***Fiscal management.*** The Ombudsman shall determine the use of the fiscal resources appropriated or otherwise available for the operation of the Office. Where local Ombudsman entities are designated, the Ombudsman shall approve the allocations of Federal and State funds provided to such entities, subject to applicable Federal and State laws and policies. The Ombudsman shall determine that program budgets and expenditures of the Office and local Ombudsman entities are consistent with laws, policies and procedures governing the Ombudsman program.

(g) ***Annual report.*** The Ombudsman shall independently develop and provide final approval of an annual report as set forth in section 712(h)(1) of the Act and as otherwise required by the Assistant Secretary.

(1) Such report shall:

(i) Describe the activities carried out by the Office in the year for which the report is prepared;

(ii) Contain analysis of Ombudsman program data;

(iii) Describe evaluation of the problems experienced by, and the complaints made by or on behalf of, residents;

(iv) Contain policy, regulatory, and/or legislative recommendations for improving quality of the care and life of the residents; protecting the health, safety, welfare, and rights of the residents; and resolving resident complaints and identified problems or barriers;

(v) Contain analysis of the success of the Ombudsman program, including success in providing services to residents of, assisted living, board and care facilities and other similar adult care facilities; and

(vi) Describe barriers that prevent the optimal operation of the Ombudsman program.

(2) The Ombudsman shall make such report available to the public and submit it to the Assistant Secretary, the chief executive officer of the State, the State legislature, the State agency responsible for licensing or certifying long-

term care facilities, and other appropriate governmental entities.

(h) Through adoption of memoranda of understanding and other means, the Ombudsman shall lead state-level coordination, and support appropriate local Ombudsman entity coordination, between the Ombudsman program and other entities with responsibilities relevant to the health, safety, well-being or rights of residents of long-term care facilities including, but not limited to:

(1) Area agency on aging programs;

(2) Aging and disability resource centers;

(3) Adult protective services programs;

(4) Protection and advocacy systems, as designated by the State, and as established under the Developmental Disabilities Assistance and Bill of Rights Act of 2000 (42 U.S.C. 15001 *et seq*.);

(5) Facility and long-term care provider licensure and certification programs;

(6) The State Medicaid fraud control unit, as defined in section 1903(q) of the Social Security Act (42 U.S.C. 1396b(q));

(7) Victim assistance programs;

(8) State and local law enforcement agencies;

(9) Courts of competent jurisdiction; and

(10) The State legal assistance developer and legal assistance programs, including those provided under section 306(a)(2)(C) of the Act.

(i) The Ombudsman shall carry out such other activities as the Assistant Secretary determines to be appropriate.

45 C.F.R. § 1324.21 Conflicts of interest

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

(a) ***Identification of organizational conflicts.*** In identifying conflicts of interest pursuant to section 712(f) of the Act, the State agency and the Ombudsman shall consider the organizational conflicts that may impact the effectiveness and credibility of the work of the Office. Organizational conflicts of interest include, but are not limited to, placement of the Office, or requiring that an Ombudsman or representative of the Office perform conflicting activities, in an organization that:

(1) Is responsible for licensing, surveying, or certifying long-term care facilities;

(2) Is an association (or an affiliate of such an association) of long-term care facilities, or of any other residential facilities for older individuals or individuals with disabilities;

(3) Has any ownership or investment interest (represented by equity, debt, or other financial relationship) in, or receives grants or donations from, a long-term care facility;

(4) Has governing board members with any ownership, investment or employment interest in long-term care facilities;

(5) Provides long-term care to residents of long-term care facilities, including the provision of personnel for long-term care facilities or the operation of programs which control access to or services for long-term care facilities;

(6) Provides long-term care coordination or case management for residents of long-term care facilities;

(7) Sets reimbursement rates for long-term care facilities;

(8) Provides adult protective services;

(9) Is responsible for eligibility determinations regarding Medicaid or other public benefits for residents of long-term care facilities;

(10) Conducts preadmission screening for long-term care facility placements;

(11) Makes decisions regarding admission or discharge of individuals to or from long-term care facilities; or

(12) Provides guardianship, conservatorship or other fiduciary or surrogate decision-making services for residents of long-term care facilities.

(b) ***Removing or remedying organizational conflicts.*** The State agency and the Ombudsman shall identify and take steps to remove or remedy conflicts of interest between the Office and the State agency or other agency carrying out the Ombudsman program.

(1) The Ombudsman shall identify organizational conflicts of interest in the Ombudsman program and describe steps taken to remove or remedy conflicts within the annual report submitted to the Assistant Secretary through the National Ombudsman Reporting System.

(2) Where the Office is located within or otherwise organizationally attached to the State agency, the State agency shall:

(i) Take reasonable steps to avoid internal conflicts of interest;

(ii) Establish a process for review and identification of internal conflicts;

(iii) Take steps to remove or remedy conflicts;

(iv) Ensure that no individual, or member of the immediate family of an individual, involved in the designating, appointing, otherwise selecting or terminating the Ombudsman is subject to a conflict of interest; and

(v) Assure that the Ombudsman has disclosed such conflicts and described steps taken to remove or remedy conflicts within the annual report submitted to the Assistant Secretary through the National Ombudsman Reporting System.

(3) Where a State agency is unable to adequately remove or remedy a conflict, it shall carry out the Ombudsman program by contract or other arrangement with a public agency or nonprofit private organization, pursuant to section 712(a)(4) of the Act. The State agency may not enter into a contract or other arrangement to carry out the Ombudsman program, and may not operate the Office directly if it:

(i) Is responsible for licensing, surveying, or certifying long-term care facilities;

(ii) Is an association (or an affiliate of such an association) of long-term care facilities, or of any other residential facilities for older individuals or individuals with disabilities; or

(iii) Has any ownership, operational, or investment interest (represented by equity, debt, or other financial relationship) in a long-term care facility.

(4) Where the State agency carries out the Ombudsman program by contract or other arrangement with a public agency or nonprofit private organization, pursuant to section 712(a)(4) of the Act, the State agency shall:

(i) Prior to contracting or making another arrangement, take reasonable steps to avoid conflicts of interest in such agency or organization which is to carry out the Ombudsman program and to avoid conflicts of interest in the State agency's oversight of the contract or arrangement;

(ii) Establish a process for periodic review and identification of conflicts;

(iii) Establish criteria for approval of steps taken by the agency or organization to remedy or remove conflicts;

(iv) Require that such agency or organization have a process in place to:

(A) Take reasonable steps to avoid conflicts of interest, and

(B) Disclose identified conflicts and steps taken to remove or remedy conflicts to the State agency for review and approval.

(5) Where an agency or organization carrying out the Ombudsman program by contract or other arrangement develops a conflict and is unable to adequately remove or remedy a conflict, the State agency shall either operate the Ombudsman program directly or by contract or other arrangement with another public agency or nonprofit private organization. The State agency shall not enter into such contract or other arrangement with an agency or organization which is responsible for licensing or certifying long-term care facilities in the state or is an association (or affiliate of such an association) of long-term care facilities.

(6) Where local Ombudsman entities provide Ombudsman services, the Ombudsman shall:

(i) Prior to designating or renewing designation, take reasonable steps to avoid conflicts of interest in any agency which may host a local Ombudsman entity.

(ii) Establish a process for periodic review and identification of conflicts of interest with the local Ombudsman entity in any agencies hosting a local Ombudsman entity,

(iii) Require that such agencies disclose identified conflicts of interest with the local Ombudsman entity and steps taken to remove or remedy conflicts within such agency to the Ombudsman,

(iv) Establish criteria for approval of steps taken to remedy or remove conflicts in such agencies, and

(v) Establish a process for review of and criteria for approval of plans to remove or remedy conflicts with the local Ombudsman entity in such agencies.

(7) Failure of an agency hosting a local Ombudsman entity to disclose a conflict to the Office or inability to adequately remove or remedy a conflict shall constitute grounds for refusal, suspension or removal of designation of the local Ombudsman entity by the Ombudsman.

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

(1) In identifying conflicts of interest pursuant to section 712(f) of the Act, the State agency and the Ombudsman shall consider individual conflicts that may impact the effectiveness and credibility of the work of the Office.

(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) Direct involvement in the licensing or certification of a long-term care facility;

(ii) Ownership, operational, or investment interest (represented by equity, debt, or other financial relationship) in an existing or proposed long-term care facility;

(iii) Employment of an individual by, or participation in the management of, a long-term care facility in the service area or by the owner or operator of any long-term care facility in the service area;

(iv) Receipt of, or right to receive, directly or indirectly, remuneration (in cash or in kind) under a compensation arrangement with an owner or operator of a long-term care facility;

(v) Accepting gifts or gratuities of significant value from a long-term care facility or its management, a resident or a resident representative of a long-term care facility in which the Ombudsman or representative of the Office provides services (except where there is a personal relationship with a resident or resident representative which is separate from the individual's role as Ombudsman or representative of the Office);

(vi) Accepting money or any other consideration from anyone other than the Office, or an entity approved by the Ombudsman, for the performance of an act in the regular course of the duties of the Ombudsman or the representatives of the Office without Ombudsman approval;

(vii) Serving as guardian, conservator or in another fiduciary or surrogate decision-making capacity for a resident of a long-term care facility in which the Ombudsman or representative of the Office provides services; and

(viii) Serving residents of a facility in which an immediate family member resides.

(d) ***Removing or remedying individual conflicts.***

(1) The State agency or Ombudsman shall develop and implement policies and procedures, pursuant to § 1324.11(e)(4), to ensure that no Ombudsman or representatives of the Office are required or permitted to hold positions or perform duties that would constitute a conflict of interest as set forth in § 1324.21(c). This rule does not prohibit a State agency or Ombudsman from having policies or procedures that exceed these requirements.

(2) When considering the employment or appointment of an individual as the Ombudsman or as a representative of the Office, the State agency or other employing or appointing entity shall:

(i) Take reasonable steps to avoid employing or appointing an individual who has an unremedied conflict of interest or who has a member of the immediate family with an unremedied conflict of interest;

(ii) Take reasonable steps to avoid assigning an individual to perform duties which would constitute an unremedied conflict of interest;

(iii) Establish a process for periodic review and identification of conflicts of the Ombudsman and representatives of the Office, and

(iv) Take steps to remove or remedy conflicts.

(3) In no circumstance shall the entity, which appoints or employs the Ombudsman, appoint or employ an individual as the Ombudsman who:

(i) Has direct involvement in the licensing or certification of a long-term care facility;

(ii) Has an ownership or investment interest (represented by equity, debt, or other financial relationship) in a long-term care facility. Divestment within a reasonable period may be considered an adequate remedy to this conflict;

(iii) Has been employed by or participating in the management of a long-term care facility within the previous twelve months.

(iv) Receives, or has the right to receive, directly or indirectly, remuneration (in cash or in kind) under a compensation arrangement with an owner or operator of a long-term care facility.

(4) In no circumstance shall the State agency, other agency which carries out the Office, or an agency hosting a local Ombudsman entity appoint or employ an individual, nor shall the Ombudsman designate an individual, as a representative of the Office who:

(i) Has direct involvement in the licensing or certification of a long-term care facility;

(ii) Has an ownership or investment interest (represented by equity, debt, or other financial

relationship) in a long-term care facility. Divestment within a reasonable period may be considered an adequate remedy to this conflict;

(iii) Receives, directly or indirectly, remuneration (in cash or in kind) under a compensation arrangement with an owner or operator of a long-term care facility; or

(iv) Is employed by, or participating in the management of, a long-term care facility.

(A) An agency which appoints or employs representatives of the Office shall make efforts to avoid appointing or employing an individual as a representative of the Office who has been employed by or participating in the management of a long-term care facility within the previous twelve months.

(B) Where such individual is appointed or employed, the agency shall take steps to remedy the conflict.