No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

Grant Nyhammer as Executive Director of the 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

Are Illinois courts subject to federal law?

2. List of Parties

All parties are listed in the caption.[1]

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. Related Proceedings

This case arises from the following proceedings:

- *Nyhammer v. Basta*, 2022 IL 128354 (Ill. 2022) (final judgment entered January 23, 2023).

- *Nyhammer v. Basta,* 2022 IL App (2d) 200460 (Ill. App. 2022) (final judgment entered March 2, 2022).

- *Nyhammer v. Basta, 2019-MR-1106* (17th Circ. 2020) (final judgment entered July 20, 2020).

[1] NIAAA is part of the nationwide aging network. The number of Americans age 60 and older served by the Aging Network increased by 34% from 55.7 mil to 74.6 mil between 2009 and 2019. ACL, *2020 Profile of Older Americans*, https://acl.gov/sites/default/files/aging%20and%20Disability%20In%20America/2020Profileolderamericans.final_.pdf.

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5. Opinions and Orders Below

The Seventeenth Judicial Circuit of Illinois granted Defendant's motion to dismiss with an order on February 28, 2020 that is unpublished. Plaintiff Nyhammer filed a Motion for Reconsideration, which was denied by memorandum order on July 20, 2020. The Appellate Court of Illinois Second District issued an unpublished opinion, *Nyhammer v. Basta,* 2022 IL App (2d) 200460U (Ill. App. 2022), on February 8, 2022 in favor of Plaintiff. Plaintiff moved for a published opinion, and the court issued a final, published opinion on March 2, 2022, *Nyhammer v. Basta,* 2022 IL App (2d) 200460 (Ill. App. 2022). The Illinois Supreme Court issued an Opinion in favor of Defendant and against Plaintiff on November 28, 2022, *Nyhammer v. Basta*, 2022 IL 128354 (Ill. 2022), and denied Plaintiff's Petition for Rehearing on January 23, 2023.

6. Jurisdiction

A. The Illinois Supreme Court entered judgment on November 28, 2022.

B. On January 23, 2023, the Illinois Supreme Court denied Plaintiff's Petition for Rehearing.

C. This Court's jurisdiction is invoked under 28 U.S.C. § 1257.

7. Relevant constitutional provisions, statutes, regulations

The following federal constitutional and statutory provisions are involved in this case and reproduced in the appendix: 42 U.S.C. § 3001(8), (10); 42 U.S.C. § 3026(f)(2)(B); 42 U.S.C. § 1983; 42 U.S.C. § 3021(a)(1); 42 U.S.C. § 3025; 42 U.S.C. § 3027; 45 C.F.R. § 1321.7 – 1321.52; 45 C.F.R. 1321.61(a)-(b); 45 C.F.R. § 1321.35; 45 C.F.R. 1321.7(b); 45 C.F.R. 1321.33; *Goldberg v. Kelly*, 397 U.S. 254, 268 (1970); *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976); *Logan v. Zimmerman Brush Company*, 455 U.S. 422, 432 (1982); *Grosjean v. American Press Co., Inc.*, 297 U.S. 233, 244 (1936); and *Vitek v. Jones*, 445 U.S. 480, n. 6 (1980).

8. Facts

Plaintiff, Northwestern Illinois Area Agency on Aging (NIAAA), is a small non-profit[2] located in Rockford, Illinois and is one of the nationwide 622[3] area agencies on aging (AAAs)[4] who are a creation of the Older Americans Act (OAA).[5] The typical AAA is

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

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

[4] 42 U.S.C. § 3002(6).

[5] 42 U.S.C. § 3001 *et seq*.; 45 C.F.R. 1321 *et seq*.

a private nonprofit[6] with limited resources who receives nearly half of its funding through the OAA.[7] The OAA designates AAAs as "public advocates" who are required to "represent the interests of older persons to executive branch officials", such as the Defendant who is the Director of the Illinois Department on Aging[8] (Department). 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 public advocate to investigate abuses in government.[9]

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[6] "The structure of AAAs varies. The majority operate as … [i]ndependent, nonprofit agencies." National Association of Area Agencies on Aging, *Trends and New Directions: Area Agencies on Aging Survey 2014*, 15, https://www.usaging.org/files/AAA%202014%20Survey.pdf.

[7] "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.

[8] 45 C.F.R. 1321.61(a)-(b).

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

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, who allocate OAA funding to AAAs[10] who in turn fund AAA provider organizations that deliver direct services to older adults.[11] In 2019, nearly 11 million older adults received services[12] nationwide from the Aging Network which includes, for example, about 2.4 million home delivered meals annually.[13]

The Department is a billion dollar[14] Illinois state agency that administers both entitlement and welfare programs such as the license plate discount program[15] and free transportation program.[16] One of the

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[10] 42 U.S.C § 3025(a)(2)(C).

[11] 42 U.S.C. § 3002(5).

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

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

[14] 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.

[15] 625 ILCS 5/3-806.3.

[16] 70 ILCS 3615/3A.15(b).

declared Congressional objectives of the OAA is that the Department provide open access to programs and services for older adults.[17] Despite the OAA being nearly fifty years' old and being crucial to the well-being of tens millions of older adults and their caregivers, it is believed to have never been addressed by this Court.

Nyhammer v. Basta[18] summarizes the background of this litigation as follows [internal citations omitted]:

> Plaintiff, Grant Nyhammer, in his capacity as executive director and general counsel of the Northwestern Illinois Area Agency on Aging (NIAAA), filed a "complaint for *mandamus*" in the circuit court of Winnebago County, naming Paula Basta, in her capacity as Director of the Department on Aging (Department), as Defendant. NIAAA is the "area agency on aging (AAA)" that was designated by the Department for "Planning Service Area 1," which comprises the [Illinois] counties of Jo Daviess, Stephenson, Winnebago, Boone, Carroll, Ogle, DeKalb, Whiteside, and Lee. As the AAA for this planning area, NIAAA is responsible for the planning and development of a "comprehensive and coordinated service delivery system" for older persons. The Department is responsible for overseeing the administration of such services and designates the AAAs to receive funds available under the

[17] 42 U.S.C. § 3001(8), (10).

[18] *Nyhammer v. Basta*, 2022 IL 128354.

Older Americans Act of 1965 (Older Americans Act), as well as other funds made available by the State or the federal government. Prior to the events leading to the dispute that is the subject of this action, the Department also designated NIAAA as a "regional administrative agency (RAA)" for the purposes of administering programs created by the Adult Protective Services Act (Protective Act). The Protective Act tasks the Department with the responsibility to "establish, design, and manage a protective services program for eligible adults who have been, or are alleged to be, victims of abuse, neglect, financial exploitation, or self-neglect."According to the complaint, NIAAA filed two petitions for administrative hearings with the Department, and the Department rejected both petitions on the basis that neither presented a "contested case" for which an administrative hearing is required under section 1-30 of the Procedure Act. The petitions were appended to the complaint for *mandamus*, and we summarize them here.

A. NIAAA's First Petition

In its first petition, NIAAA alleges as follows. In July 2013, NIAAA sent an email to the Department, stating that the new Protective Act Program Services Manual (Manual) was invalid and requesting a recall of the Manual. As documented by correspondence appended to the first petition, in October 2013, NIAAA sent an e-mail to the Department stating that NIAAA was considering litigation regarding

the Manual. In December 2013, the Department notified NIAAA that it was terminating its fiscal year 2014 Protective Act grant pursuant to the grant agreement, which provides for termination without cause by either party with 30 days' notice. The notification also provided that NIAAA would no longer serve as RAA under the Protective Act and the Department would assume that role as to Planning Service Area 1 until further notice.

The first petition alleges that five years later, in April 2019, an employee of the Department told NIAAA that she had been given an order in 2014 to withhold funding from NIAAA to retaliate for its advocacy regarding the Manual. Although NIAAA does not know what funding was withheld, it alleges that in 2014-15, the Department awarded $3.79 million in "other funding" to the other AAAs but that NIAAA received zero "other funding." Despite its efforts to have the Department investigate this past withholding of funding, the Department has not done so.

In its first petition, NIAAA requests the Department to, *inter alia*, adopt administrative rules for "contested case" hearings before the Department and to compensate NIAAA for the lost funding. The Department denied the request for a hearing on the basis that the funding issues did not present a "contested case" under the Procedure Act. The Department invited a discussion of these issues to resolve NIAAA's concerns but stated it could

not issue a "final decision or order," as defined in the Procedure Act, because that provision is only applicable to "contested cases."

B. NIAAA's Second Petition

In its second petition, NIAAA requests a hearing on the Department's 2019 rejection of NIAAA's designation of Protective Act providers. The petition alleges that the Department had conflicting standards for the designation of service providers. According to the second petition, although the Department's stated reason for rejecting the designation was "errors in the instructions and application used for scoring purposes," the Department had not performed such a review or rejected NIAAA's designation "in at least ten years." The second petition requests the Department to adopt administrative rules for

"contested case" hearings, cease using the Manual, and accept NIAAA's designation of Protective Act provider.

The Department rejected the second petition on the basis that it did not present a "contested case." The Department explained that the Protective Act defines "Provider Agency" as "any public or nonprofit agency in a planning and service area that is selected by the Department or appointed by the [RAA] with prior approval by the Department." The Department further explained that the Protective Act provides that an AAA must obtain "prior approval" from the Department as

> to its adult protective services provider designation process. Because these decisions are discretionary with the Department, the Department determined they do not present "contested cases" requiring a hearing.
>
> …The circuit court dismissed NIAAA's complaint for *mandamus*…[and] we [Illinois Supreme Court] find that Count I of NIAAA's complaint for *mandamus* is moot, and the circuit court properly dismissed counts II and III of the complaint because NIAAA cannot show a clear right to an administrative hearing ….[19]

In addition to the above *Nyhammer* summary, the following are other relevant facts. Regarding the First Petition, NIAAA alleged in:

- Count I that the Department not having proper administrative hearing rules is an impediment to NIAAA getting a fair hearing and discourages AAAs from challenging the conduct of the Department;

- Count II that the Department violated the OAA by withholding funding from NIAAA and not affording NIAAA due process;

[19] *Nyhammer v. Basta*, 2022 IL 128354 ¶2-5, 7, 23.

- Count III that the Department withheld funding from NIAAA in retaliation for NIAAA's advocacy for older adults;

- Count IV that the Department withholding funding from NIAAA for a corrupt purpose violates multiple provisions of the OAA (42 U.S.C. § 3021(a)(1); 42 U.S.C § 3025(a)(1)(D); 42 U.S.C § 3025(a)(2)(E); 42 U.S.C § 3027(a)(10) which require the Department to act in the best interests of older adults. *Nyhammer* never mentions 42 U.S.C. § 3021(a)(1), 42 U.S.C § 3025(a)(1)(D), 42 U.S.C § 3025(a)(2)(E), or 42 U.S.C § 3027(a)(10);

- Count V that the Department violated NIAAA's due process rights in violation of 42 U.S.C. § 3026(f)(2)(b);

- Count VI that the Department has failed to take adequate measures to prevent future violations of NIAAA's due process rights;

- Count VII that the Department terminated NIAAA as the RAA in retaliation for NIAAA's advocacy for older adults;

- Count VIII that the Department has improperly interfered with NIAAA's ability to function as the public advocate representing the interests of older adults; and

- Count IX that the Department violated Illinois law by withholding funding from NIAAA for a corrupt purpose.[20]

The First Petition requested an administrative hearing under multiple provisions, including 42 U.S.C. §3027(a)(5), 42 U.S.C. § 3026(f)(2)(b), and 42 U.S.C. § 1983. *Nyhammer* never mentions 42 U.S.C. §3027(a)(5) and 42 U.S.C. § 1983. *Nyhammer* only mentions 42 U.S.C. § 3026(f)(2)(b) once in a footnote in its factual summary and never discusses if NIAAA is entitled to an administrative hearing under this OAA provision[21] which states that "[the Department] shall not make a final determination [about] withholding funds…without first affording the area agency…a public hearing concerning the action."

Regarding the Second Petition, NIAAA alleged that in:

- Paragraph 33 that it is doubtful that any request from an older adult for an administrative hearing reached the Department in the last nine years because the Department moved nine years ago from the mailing address it has published for mailing a hearing request;

[20] C 16 – C 19.

[21] *Nyhammer*, 2022 IL 128354 at ¶ 7.

- Count I and II that the Department unreasonably rejected NIAAA's designation of APS provider organizations;

- Count III that the Department tainted and improperly interfered with NIAAA's selection of APS providers;

- Count IV that the Department is improperly managing the APS program and the APS provider selection process thorough an illegal manual; and

- Count V that the Department does not have proper administrative hearing rules.

Regarding the complaint for mandamus (Complaint), it alleges that it has been at least three years since an older adult received an administrative hearing from the Department.[22] The Complaint and supporting documents also allege that the Defendant:

- Does not have proper administrative rules for older adults to access administrative hearings which violates their due process rights;[23]

[22] C 9.

[23] C 52.

- Has shut down the hearing process to older adults to avoid accountability;[24] and

- Failed to provide NIAAA the required administrative hearings on the First and Second Petitions which:

    - Violates NIAAA's Constitutionally protected due process rights; and

    - Inhibits NIAAA's ability to function as the public advocate for older adults.

9. Federal Issues Raised

The first federal issues brought up in this case occurred on June 26, 2019 when NIAAA filed its first Petition for Hearing (First Petition) with the Department.[25] In its First Petition, NIAAA requested a hearing from the Department under 42 U.S.C. § 3027(a)(5), 42 U.S.C. § 3026(f)(2)(b), 42 U.S.C. § 3001; 45 C.F.R. § 1321, 42 U.S.C. § 1983, and a number of state laws.[26] Also in the First Petition, NIAAA complained that the Department violated NIAAA's due process rights, NIAAA's rights as a public advocate, and the OAA by withholding funding from NIAAA for an improper purpose, i.e. retaliation for

[24] C 53.

[25] C 21.

[26] C 22.

NIAAA's public advocacy, and terminating NIAAA as the Regional Administrative Agency (RAA) under the Adult Protective Service (APS) program without providing due process.[27] In a letter from the Department to NIAAA, dated July 29, 2019, the Department refused to offer a hearing or a final administrative decision on the First Petition.[28]

The second set of federal issues arose when NIAAA filed a second Petition for Hearing (Second Petition) on August 23, 2019[29] in which it alleged the violation of two more property interests under due process – the right to designate APS providers[30] and the right to participate in the rulemaking process.[31] On September 24, 2019, the Department refused to offer a hearing on the Second Petition.[32]

The third set of federal issues arose when NIAAA filed its Complaint for Mandamus on November 5, 2019 in order to obtain a hearing from the Department

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[27] C 17 – 19.

[28] C 31.

[29] C 39.

[30] C 36 – 37.

[31] C 35 ("The rulemaking process requires … there be an opportunity for the public to comment on the proposed rules, there be public hearings …."); C 37 ("The Manual was not adopted under the rulemaking process ….").

[32] C 51.

on NIAAA's petitions.[33] NIAAA reiterated its OAA authority as the Public Advocate for older adults[34] and requested that the Department provide NIAAA with a hearing for all of the federal law-based reasons stated in the First and Second Petitions, including due process.[35] NIAAA reiterated, in its Brief in Support of Complaint for Mandamus, that the Department is denying access to administrative hearings not just to NIAAA but to 2.3 million older adults.[36] Also, NIAAA reiterated its right to funding under the OAA Act,[37] its right to designate APS providers,[38] its right to participate in the rulemaking process,[39] and its right to be the RAA.[40] At the hearing for the Motion to Dismiss, the trial court denied that NIAAA represented any older adults in the Complaint for Mandamus, denying NIAAA authority to act as public advocate for older adults in the Complaint for Mandamus and its petitions.[41] Also, the trial court

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[33] C 4.

[34] C 5.

[35] C 9, C 53 – 55.

[36] C 52 – 53.

[37] C 53 – 54.

[38] C 9.

[39] C 8 – C 9.

[40] C 9.

[41] R 16 – 17.

denied that NIAAA had any property interest in the withheld funding[42] and ignored all other federal law basis by which NIAAA claimed it had a right to a hearing.[43] On March 6, 2020, NIAAA filed a Motion to Vacate the decision of the court, again restating NIAAA's federal rights under due process and the OAA to a hearing, including 42 U.S.C. § 3026(f)(2)(A) and (B); 45 C.F.R. § 1321.63(b); 42 U.S.C. § 1983; and 42 U.S.C. § 3027(a)(5).[44] Also, NIAAA reaffirmed its role as the public advocate.[45] The court responded with its Memorandum of Decision as to Plaintiff's "Motion to Vacate" (sic) ie Motion to Reconsider, stating that due process, 42 U.S.C. § 3026(f)(2)(A) and (B), and 45 C.F.R. § 1321.63(b) did not apply because NIAAA did not plead well enough that OAA funding had been withheld.[46] The court went on to state, without explanation, that the other statutes that NIAAA stated it had a right to a hearing under did not apply.[47]

The fourth set of federal issues arose when NIAAA filed its Brief and Appendix of Plaintiff-Appellant Grant Nyhammer (Appellant Brief) in the Appellate

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[42] R 21 – 22.

[43] R 17 – 35.

[44] C 123 – 126.

[45] C 126.

[46] C 158 – 159.

[47] C 159.

Court of Illinois Second Judicial District on November, 23, 2020. NIAAA, again, reiterated its OAA authority as the Public Advocate for older adults,[48] its federal rights under due process[49] and the OAA to a hearing, including 42 U.S.C. § 3026(f); 42 U.S.C. § 1983; and 42 U.S.C. § 3027(a)(5).[50] All other federal rights as alleged in the First Petition[51] and Second Petition[52] were again asserted. The Appellate Court issued its published opinion (Appellate Opinion) on March 2, 2022 in favor of NIAAA, holding that:

> [T]he Department failed and refused to provide a means for administrative review for the determination of NIAAA's rights, duties, and responsibilities because it failed to grant a hearing where findings of fact and conclusions of law were determined after an opportunity to be heard … We determine that the Department shall grant the NIAAA hearings and render decisions so that, if desired, administrative review may be perfected.[53]

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[48] Appellant Brief, 8.

[49] Appellant Brief, 14 – 17.

[50] Appellant Brief, 2.

[51] Appellant Brief, 9 – 10, 16 – 17.

[52] Appellant Brief, 11 – 12, 21.

[53] A 54; (Appellate Opinion, ¶42 – 43).

The Department appealed the decision, and NIAAA filed its brief[54] (Answer) in the Illinois Supreme Court, again reaffirming all of its federal rights as the Public Advocate acting on behalf of 2.3 million older adults in Illinois[55] and its rights to a hearing under federal law, including due process, that were affirmed in the lower courts.[56] On November, 28 2022, the Illinois Supreme Court issued an Opinion (Supreme Court Opinion) ignoring all of the federal statutes by which NIAAA requested a hearing and never taking into consideration NIAAA's rights as a public advocate.[57] The Supreme Court discussed due process but never directly cited federal case or statutory law on the matter and instead kept its analysis to Illinois law.[58] NIAAA filed a Petition for Rehearing (Supreme Court Petition for Rehearing) in the Illinois Supreme Court

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[54] NIAAA let its Answer of Plaintiff-Respondent to Defendant-Petitioner's Petition for Leave to Appeal stand as its reply brief. See Notice of Plaintiff-Appellee's Election to Allow Answer to the Petition for Leave to Appeal to Stand as Brief (filed July 11, 2022).

[55] Answer 2 – 3.

[56] Answer 4 – 8.

[57] *Nyhammer v. Basta*, 2022 IL 128354 (Ill. 2022); A 1 – 24 (Supreme Court Opinion).

[58] The Illinois Supreme Court mentioned 42 U.S.C. 3026(f)(2)(b) in a footnote but, in doing so, it did not discuss due process nor apply the statute because the court did not believe NIAAA's allegations that OAA funding had been withheld. *Nyhammer v. Basta*, 2022 IL 128354, n. 2 (Ill. 2022). The court did not make any findings of fact in the case. A 20 – 21 (Supreme Court Opinion, ¶ 63 – 67).

on December 15, 2022, stating that the court had ignored all federal law, including binding U.S. Supreme Court precedent that NIAAA cited as a basis for its right to hearings.[59] On January 23, 2023, the Supreme Court issued a three line denial stating: "Petition for Rehearing Denied. The mandate of this Court will issue to the Appellate Court and/or Circuit Court or other agency on 02/27/2023."

10. Argument

This Petition for Certiorari (Certiorari) should be granted because *Nyhammer* is a danger to the 11 million vulnerable older adults who receive services from the Aging Network as *Nyhammer* eviscerates the ability of the 622 AAAs nationwide to function as the 'public advocates' protecting older adults from actions of State Agencies such as the Department.[60] As demonstrated by the First and Second Petitions, some State Agencies will abuse their authority to the detriment of older adults and AAAs as public advocates will have no legal recourse under *Nyhammer* to challenge the misconduct. Since it is believed there are no reported federal cases regarding AAAs role as public advocates under the OAA, it is expected that *Nyhammer* will be used 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.

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[59] Supreme Court Petition for Rehearing, 6 – 12.

[60] Supreme Court Petition for Rehearing, 2, 10.

Remarkably, *Nyhammer* gives State Agencies this extraordinary and unwarranted authority to refuse to give administrative hearings to public advocates by ignoring both:

- United Supreme Court (Court) precedent; and
- the OAA.

This Certiorari, therefore, should be granted as *Nyhammer* poses a serious threat to a properly functioning Aging Network that provides essential services to millions of vulnerable older adults nationwide.

A. *Nyhammer* ignores *Goldberg v. Kelly*

Nyhammer ignores *Goldberg v. Kelly*[61] in giving the Department the astonishing authority to continue denying 2.3 million older adults in Illinois access to administrative hearings to challenge the termination of welfare benefits.[62] *Goldberg* requires that before a welfare recipient has their benefits terminated, "a recipient have timely and adequate notice detailing the reasons for a proposed termination, and an effective opportunity to defend by confronting any adverse witnesses and by presenting his own

[61] *Goldberg v. Kelly*, 397 U.S. 254 (1970).

[62] Second District Reply Brief, 7; C 116 – 17; C 123; C 125; Supreme Court Answer of Plaintiff-Respondent to Defendant-Petitioner's Petition for Leave to Appeal, 2 – 3.

arguments and evidence orally."[63] *Nyhammer* offers no explanation for ignoring *Goldberg*.

Nyhammer, instead, effectively overturns *Goldberg* by giving the Department the power to decide for itself who can get an administrative hearing. Under *Nyhammer*, to get an administrative hearing an older adult "must *show* that the [Department's termination of a welfare benefit] decision presents a contested case [emphasis added]."[64] Under *Nyhammer*, the determination of a request that 'shows' a contested case is solely within discretion of the Department and that determination is not subject to judicial review.[65] For example, despite federal law requiring[66] that NIAAA be given

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[63] *Goldberg,* 397 U.S. at 268.

[64] *Nyhammer*, 2022 IL 128354 at ¶ 73.

[65] *Nyhammer* "declines to address the issue of whether the Department's decisions [to refuse to give administrative hearings] that are at issue in this case are subject to review." *Nyhammer,* 2022 IL 128354 at ¶71. The reason *Nyhammer* declined to address the issue is because the appellate court was right when it stated that "the Departments summary dismissal of the NIAAA's petitions and its conclusory statements that the petitions failed to present contested cases were insufficient for meaningful judicial review." *Nyhammer*, 2022 IL 128354 at ¶69. Further, even if older adults have the right to challenge the Department's denial of a hearing request through a writ of certiorari, it is very unlikely they will have the wherewithal to challenge a billion-dollar State Agency in court, so the Illinois administrative hearing process will continue to be effectively closed to older adults.

[66] The First Petition requested a hearing under 42 U.S.C. §3027(a)(5) which states "[the Department] will … afford an

an administrative hearing and the First Petition pleading 18 pages of facts and law, the Department's summary conclusion that the First Petition had not 'shown' it is a contested case is beyond judicial review under *Nyhammer*.

Nyhammer giving the Defendant unfettered authority to reject any administrative hearing request, unfortunately, will result in the Department's administrative hearing process continuing to be permanently closed to older adults, as it has been for years, in contradiction to *Goldberg*. *Nyhammer*, consequently, is a dangerous precedent which could create upheaval in the Aging Network, other Illinois welfare programs, and public welfare programs nationwide, so this Petition for Certiorari should be granted to reaffirm that *Goldberg* still applies to welfare benefits in Illinois and elsewhere.

B. *Nyhammer* ignores the Older Americans Act

In addition to ignoring *Goldberg*, *Nyhammer* also ignores the OAA in giving the Department unreviewable power to refuse giving administrative

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opportunity for a hearing upon request … to any area agency on aging submitting a plan under [the OAA]"; 42 U.S.C. § 3026(f)(2)(b) which states "[the Department] shall not make a final determination [about] withholding funds … without first affording the area agency … a public hearing concerning the action"; and 42 U.S.C. § 1983 which states that "every person who [acting on behalf of a state agency] … causes … [a] deprivation of any rights … secured by the Constitution and laws, shall be liable to the party injured in … [a] proper proceeding for redress."

hearings. While *Nyhammer* does acknowledge that the Department is subject to the OAA and that the Complaint is based on the Department's failure to comply with the OAA,[67] *Nyhammer* inexplicably proceeds to ignore the OAA in stating that "the relevant statutes and regulations grant the Department essentially unbridled discretion in…providing funding for programs for older Americans"[68] so NIAAA cannot get an administrative hearing. *Nyhammer* giving the Department 'unbridled discretion' in administering the Aging Network is baffling as it directly contradicts the myriad of detailed and explicit OAA limitations[69] of the Department.

If *Nyhammer* had considered the OAA, as required,[70] it would have come to the opposite conclusion which is that the Department has virtually no discretion when dealing with AAAs as the OAA severely limits the Department's ability to:

- Cut AAAs' funding;[71]

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[67] *Nyhammer*, 2022 IL 128354, ¶ 47.

[68] *Nyhammer,* 2022 IL 128354, ¶ 67.

[69] 42 U.S.C. § 3025 *et seq*.; 42 U.S.C. § 3027 *et seq.*, 45 C.F.R. § 1321.7 – 1321.52.

[70] *Testa v. Katt*, 330 U.S. 386, 391 (1947) ("the constitution and the laws passed pursuant to it are the supreme laws of the land binding alike upon states, courts, and the people…").

[71] 42 U.S.C. § 3026(f)(2)(B).

- Remove AAAs as the area agencies on aging;[72]

- Change AAAs' service area and the number of older adults that AAAs serve;[73]

- Take any action regarding any aging program in an AAAs' service area except through and with the approval of the AAA;[74]

- Fund legal assistance services to older adults unless the AAA has made a "finding" approving the legal service provider;[75]

- Determine how funding should be allocated statewide without first consulting the AAAs;[76]

- Dictate AAAs' grievance policy;[77]

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[72] 45 C.F.R. 1321.35.

[73] 42 U.S.C. § 3025(b)(5)(C).

[74] 45 C.F.R. 1321.7(b).

[75] 42 U.S.C. §3027(a)(11)(B).

[76] 42 U.S.C. § 3025(a)(2).

[77] 42 U.S.C. §3027(a)(5)(B).

- Interfere with AAAs independence by making the AAA a branch of the State Agency;[78]

- Designate a replacement for an AAA if someone involved in the designation process at the State Agency has a potential conflict of interest;[79]

- Provide any aging service directly to older adults in place of the AAA's designated service provider;[80] etc.

The above special protections given to AAAs in the OAA are believed to be unique in federal law and are done because older adults are especially susceptible to being exploited by State Agencies and because AAAs are vulnerable to bureaucratic pressure from State Agencies who fund them. To effectuate these limitations put on the Department, the OAA, therefore, mandates that AAAs, as public advocates, be given administrative hearings on demand from State Agencies.[81]

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[78] 45 C.F.R. 1321.33.

[79] 42 U.S.C. §3027(a)(7)(B).

[80] 42 U.S.C. §3027(a)(8)(A).

[81] The Department "will … afford an opportunity for a hearing upon request … to any area agency on aging submitting a plan under [the OAA]." 42 U.S.C. §3027(a)(5). This means the only condition for a AAA to get a hearing is that it has submitted an area plan which all active AAAs do, so all active AAAs have a right to a hearing on demand. See also 42 U.S.C. § 3026(f)(2)(b).

Nyhammer, unfortunately, ignores the AAAs unique role in the Aging Network by treating NIAAA as if it is some ordinary nonprofit who has no statutory protections and no explicit statutory right to challenge the Department's misconduct.[82] This Certiorari, therefore, should be granted so that this Court can clarify AAAs' unique OAA role as the public advocates protecting the interests of vulnerable older adults from State Agencies such as the Department who decide to abuse their authority to the detriment of older adults and a properly functioning Aging Network.

C. *Nyhammer* ignores *Mathews v. Eldridge*

In addition to the OAA mandating that NIAAA be given administrative hearings, *Mathews v. Eldridge*[83] also requires that NIAAA, as the public advocate, be given administrative hearings to defend its property interests. Under *Mathews* and *Grosjean v. American Press Co., Inc.,*[84] NIAAA has the right to an administrative hearing to defend its due process protected property interest (Property Interest).[85] Under *Logan v. Zimmerman*, the State of Illinois creates a Property Interest when it confers a legal

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[82] *Nyhammer*, 2022 IL 128354, ¶ 53 ("we find nothing in these [statutory and regulatory] provisions that requires that … [NIAAA be given an] opportunity for a hearing").

[83] *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).

[84] *Grosjean v. American Press Co., Inc*., 297 U.S. 233 (1936).

[85] Second District Reply Brief, 7.

right to NIAAA.[86] Under *Vitek v. Jones*, once Illinois has conferred a Property Interest to NIAAA, that Property Interest cannot be infringed by the Department unless NIAAA is given due process.[87]

Based on these Court precedents, the First Petition requested a hearing to vindicate the following four NIAAA Property Interests:

a. To be the public advocate representing older adults pursuant to 89 Ill. Admin. Code § 230.150(a)(1)-(3);

b. To receive funding from the Department pursuant to 20 ILCS 105/3.07;

c. To participate in the administrative rule making process (e.g. making public comments on proposed regulations as the public advocate, testifying at hearings on proposed regulations as the public advocate) under 5 ILCS 100/5-40; and

d. To be the regional administrative agency in the APS program pursuant to 5 ILCS 100/5-40.[88]

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[86] *Logan v. Zimmerman Brush Company*, 455 U.S. 422, 432 (1982).

[87] *Vitek v. Jones*, 445 U.S. 480, n. 6 (1980) (quoting *Arnett v. Kennedy*, 416 U.S. at 167). Second District Reply Brief, 7 – 10.

[88] Second District Reply Brief, 7 – 10.

The Second Petition also added the Property Interest of NIAAA having the right to designate APS provider agencies under then 89 Ill. Admin. Code § 270.215.[89]

Nyhammer, unfortunately, just ignores the above Court precedents in concluding that NIAAA has no Property Interests and no right to an administrative hearing.[90] *Nyhammer* not allowing NIAAA to protect these five Property Interests through an administrative hearing makes them meaningless proclamations which will continue to be ignored by the Department without consequence. This Certiorari, therefore, should be granted to affirm that NIAAA, and all AAAs, have the constitutional right as public advocates to administrative hearings when the Department infringes on their Property Interests.

D. *Nyhammer* engaged in secret deliberations in violation of NIAAA's due process rights

Finally, the Certiorari should be granted because *Nyhammer* engaged in secret deliberations in determining that Count I of the Complaint is moot.[91] *Nyhammer* engaging in secret deliberations violates NIAAA's due process rights which require that

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[89] Second District Reply Brief, 17 – 19.

[90] *Nyhammer*, 2022 IL 128354, ¶ 67 (NIAAA has no "legitimate claim of entitlement to funding or service provider designations for which it seeks hearings").

[91] *Nyhammer*, 2022 IL 128354 at ¶ 34.

NIAAA be given an "opportunity to be heard at a meaningful time and in a meaningful manner ...."[92]

Count I of the Complaint alleges that the Defendant does not have proper hearing rules that comply with Article 10 of the Illinois Administrative Procedure Act (Procedure Act) and asks that the Defendant be ordered to adopt hearing regulations that comply with the Procedure Act.[93] Two years into this litigation, the Department decided to repeal the hearing regulation challenged in the Complaint by admitting the hearing regulation was "outdated, confusing, duplicative, unnecessary, overlapping, and unnavigable."[94]

Despite having repealed and replaced the old regulation over a year before the *Nyhammer* decision, the Defendant has never asserted that Count I is moot.[95] This means that the Defendant has conceded in writing that a mootness defense to Count I was not properly before *Nyhammer*.

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[92] *Mathews*, 424 U.S. at 333 (1976).

[93] C 8.

[94] *Nyhammer*, 2022 IL 128354 at ¶ 60.

[95] In its June 29, 2022 brief to the *Nyhammer* Supreme court, the Defendant asked the *Nyhammer* Supreme court to "remand this action to the circuit court for further proceedings … [so that the Defendant] could raise a mootness defense now that the Department has new procedural rules." Supreme Court Defendant's Brief, 49 – 50.

Nyhammer, nevertheless, sustained the dismissal of Count I for mootness by claiming that "NIAAA conceded at oral argument that, effective August 10, 2021, the Department enacted regulations that specifically require hearings before the Department to be conducted in accordance with article 10 of the Procedure Act."[96] NIAAA made no such concession. Counsel for NIAAA has listened to the oral argument multiple times after *Nyhammer* was released and believes that the best possible explanation for *Nyhammer's* mistaken claim is that the court mistook Defendant's counsel for NIAAA's counsel.

Regardless, *Nyhammer* was apparently secretly considering dismissing Count I for a mootness defense that has never been properly asserted by the Defendant and then, unbeknownst to the parties, was listening for something from the oral argument to justify declaring that Count I is moot. NIAAA obviously was not given a fair opportunity to respond to *Nyhammer's* secret deliberations about Count I and was denied the opportunity of responding by, for example, asserting the public-interest exception to the mootness doctrine[97] or asking leave to amend Count I to cite the new hearing regulation, which NIAAA believes is even more non-compliant with the Procedure Act than the repealed regulation cited in the Complaint.[98] Since the issue of mootness has not

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[96] *Nyhammer*, 2022 IL 128354 at ¶ 34.

[97] See *Holly v. Montes*, 896 N.E.2d 267, 271 (Ill. 2008).

[98] *Nyhammer* claiming Count I is moot because it cannot grant NIAAA relief requested is error as *Nyhammer* misunderstands that Count I is just asking that the Defendant be ordered to

been properly before *Nyhammer* and NIAAA was not given a fair opportunity to respond to *Nyhammer's* secret deliberations, it was a violation of NIAAA's due process rights for *Nyhammer* to *sua sponte* declare that Count I is moot.

E. Conclusion

As discussed above, this Certiorari should be granted because *Nyhammer* ignored relevant Court precedent/federal statutes in denying older adults and NIAAA their federally protected due process rights to administrative hearings. To recap, *Nyhammer* ignored the following in affirming the dismissal of the Complaint:

1. 42 U.S.C. § 3021(a)(1);
2. 42 U.S.C § 3025(a)(1)(D);
3. 42 U.S.C § 3025(a)(2)(E);
4. 42 U.S.C § 3027(a)(10);
5. 42 U.S.C. § 3025 *et seq.*;
6. 42 U.S.C. § 3027 *et seq.*;
7. 45 C.F.R. § 1321.7 – 1321.52;
8. 45 C.F.R. 1321.61(a)-(b);
9. 42 U.S.C. § 3027(a)(5);
10. 42 U.S.C. § 3026(f)(2)(B);
11. 45 C.F.R. 1321.35;
12. 42 U.S.C. § 3025(b)(5)(C);

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implement a hearing regulation that complies with the Procedure Act. Since the new hearing regulation also does not comply with the Procedure Act, the remedy for Count I is still viable contrary to the claims of *Nyhammer* that it is "impossible for the court to grant effectual relief." *Nyhammer*, 2022 IL 128354 at ¶34.

13. 45 C.F.R. 1321.7(b);
14. 42 U.S.C. § 3027(a)(11)(B);
15. 42 U.S.C. § 3025(a)(2);
16. 42 U.S.C. § 3027(a)(5)(B);
17. 45 C.F.R. 1321.33;
18. 42 U.S.C. § 3027(a)(7)(B);
19. 42 U.S.C. § 3027(a)(8)(A);
20. 42 U.S.C. § 1983;
21. *Goldberg*;
22. *Mathews*;
23. *Logan*;
24. *Grosjean*; and
25. *Vitek*.

Nyhammer, consequently, is obviously based on the faulty premise that Illinois courts are not subject to federal law so this Certiorari should be granted to clarify that Illinois courts are obligated to apply relevant federal statutes and Court precedents in litigation.

Respectfully submitted,

/s/ Grant Nyhammer

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NO: _____

IN THE
UNITED STATES SUPREME COURT

Grant Nyhammer as Executive Director of the 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 128354

IN THE
SUPREME COURT
OF
THE STATE OF ILLINOIS

(Docket No. 128354)

GRANT NYHAMMER, Appellee, v. PAULA BASTA, in Her Official Capacity as Director of Aging, Appellant.

Opinion filed November 28, 2022.

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

Chief Justice Theis and Justices Anne M. Burke, Neville, Michael J. Burke, Carter, and Holder White concurred in the judgment and opinion.

OPINION

¶ 1 Administrative agencies have been granted authority by our General Assembly to make a myriad of decisions affecting all aspects of society. These agencies are part of the executive branch of

our government and are established to perform essentially executive functions. 73 C.J.S. *Public Administrative Law and Procedure* § 33 (Oct. 2022 Update). Generally, administrative agencies have no judicial powers. *Id.* § 36. However, an administrative agency may exercise a judicial or quasi-judicial function if it decides a dispute of adjudicative fact or if the law otherwise requires it to act in a judicial manner. *Id.* In Illinois, such adjudicatory proceedings are referred to as "contested case[s]," which require the agency to adopt procedural safeguards that resemble those provided in an evidentiary hearing. See 5 ILCS 100/10-5 (West 2018). In this case, this court is asked to consider whether two agency decisions, both of which are committed to the agency's discretion, require hearings under these provisions of the Illinois Administrative Procedure Act (Procedure Act) (5 ILCS 100/1-1 *et seq.* (West 2018)). For the following reasons, we find that they do not, and we reverse the decision of the appellate court that held otherwise, thus affirming the circuit court's judgment that dismissed a complaint for *mandamus* to direct the agency to hold such hearings.

¶ 2 I. BACKGROUND

¶ 3 Plaintiff, Grant Nyhammer, in his capacity as executive director and generalcounsel of the Northwestern Illinois Area Agency on Aging (NIAAA), filed a "complaint for *mandamus*" in the circuit court of Winnebago County, naming Paula Basta, in her capacity as Director of the Department on Aging (Department), as Defendant. NIAAA is the "area agency on aging (AAA)" that was designated by the Department for "Planning Service Area 1,"

which comprises the counties ofJo Daviess, Stephenson, Winnebago, Boone, Carroll, Ogle, De Kalb, Whiteside, and Lee. 20 ILCS 105/3.08 (West 2018). As the AAA for this planning area, NIAAA is responsible for the planning and development of a "comprehensive andcoordinated service delivery system" for older persons. *Id.* § 3.07. The Department is responsible for overseeing the administration of such services and designates theAAAs to receive funds available under the Older Americans Act of 1965 (Older Americans Act) (42 U.S.C.A. § 3001 *et seq.* (2018)), as well as other funds made available by the State or the federal government. 20 ILCS 105/3.07 (West 2018). Prior to the events leading to the dispute that is the subject of this action, the Department also designated NIAAA as a "regional administrative agency (RAA)"for the purposes of administering programs created by the Adult Protective ServicesAct (Protective Act). 320 ILCS 20/1 *et seq.* (West 2014). The Protective Act tasksthe Department with the responsibility to "establish, design, and manage a protective services program for eligible adults who have been, or are alleged to be, victims of abuse, neglect, financial exploitation, or self-neglect." *Id.* § 3(a).

¶ 4 According to the complaint, NIAAA filed two petitions for administrative hearings with the Department, and the Department rejected both petitions on the basis that neither presented a "contested case" for which an administrative hearing is required under section 1-30 of the Procedure Act. 5 ILCS 100/1-30 (West 2018). The petitions were appended to the complaint for *mandamus*, and we summarize them here.

¶ 5 A. NIAAA's First Petition

¶ 6 In its first petition, NIAAA alleges as follows. In July 2013, NIAAA sent an e- mail to the Department, stating that the new Protective Act Program Services Manual (Manual) was invalid and requesting a recall of the Manual. As documented by correspondence appended to the first petition, in October 2013, NIAAA sent an e-mail to the Department stating that NIAAA was considering litigation regarding the Manual. In December 2013, the Department notified NIAAA that it was terminating its fiscal year 2014 Protective Act grant pursuant to the grant agreement, which provides for termination without cause by either party with 30 days' notice. The notification also provided that NIAAA would no longer serve as RAA under the Protective Act and the Department would assume that role as to Planning Service Area 1 until further notice.[1]

¶ 7 The first petition alleges that five years later, in April 2019, an employee of theDepartment told NIAAA that she had been given an order in 2014 to withhold funding from NIAAA to retaliate for its advocacy regarding the Manual. AlthoughNIAAA does not know what funding was withheld, it alleges that in 2014-15, the Department awarded $3.79 million in "other funding" to the other AAAs but that NIAAA received zero "other funding."[2] Despite its efforts to have the Departmentinvestigate this past withholding of funding, the Department has not done so.

¶ 8 In its first petition, NIAAA requests the

Department to, *inter alia*, adopt administrative rules for "contested case" hearings before the Department and to compensate NIAAA for the lost funding. The Department denied the request for a hearing on the basis that the funding issues did not present a "contested case" under the Procedure Act. The Department invited a discussion of these issues to resolve NIAAA's concerns but stated it could not issue a "final decision or order," as defined in the Procedure Act, because that provision is only applicable to "contestedcases." See *id.* § 10-50.

¶ 9 B. NIAAA's Second Petition

¶ 10 In its second petition, NIAAA requests a hearing on the Department's 2019 rejection of NIAAA's designation of Protective Act providers. See 320 ILCS 20/3(a) (West 2018) (the Department shall contract with and/or fund regional administrative agencies, provider agencies, or both, for provision of Protective Act functions). The petition alleges that the Department had conflicting standards for the designation of service providers. According to the second petition, although the Department's stated reason for rejecting the designation was "errors in the instructions and application used for scoring purposes," the Department had not performed such a review or rejected NIAAA's designation "in at least ten years." The second petition requests the Department to adopt administrative rules for "contested case" hearings, cease using the Manual, and accept NIAAA's designation of Protective Act provider.

¶ 11 The Department rejected the

second petition on the basis that it did not present a "contested case." The Department explained that the Protective Act defines "Provider Agency" as "any public or nonprofit agency in a planning and service area that is selected by the Department or appointed by the [RAA] with prior approval by the Department." *Id.* § 2(h). The Department further explained that the Protective Act provides that an AAA must obtain "prior approval" from the Department as to its adult protective services provider designation process. *Id.*

§ 3(b). Because these decisions are discretionary with the Department, the Department determined they do not present "contested cases" requiring a hearing.

¶ 12 C. NIAAA's Claims for *Mandamus*

¶ 13 Count I of the complaint alleges that the Department does not have administrative rules that comply with the Procedure Act. See 5 ILCS 100/10-20 (West 2018). Count II of the complaint alleges that the Department has a duty to provide NIAAA with an administrative hearing on the initial petition regarding the withholding of "other funding." Count III of the complaint alleges that the Department has a duty to provide NIAAA a hearing on the second petition regarding the rejection of NIAAA's adult protective services provider designation (service provider designation). The complaint requests the circuit court to enter a writ of *mandamus*, ordering the Department to (1) adopt administrative rules that comply with the Procedure Act for "contested case" hearings, (2) provide NIAAA a hearing on its first petition, (3) provide NIAAA a

hearing on its second petition,
(4) pay NIAAA's damages and costs, and (5) pay litigation expenses and attorney fees.

¶ 14 D. The Department's Motion to Dismiss

¶ 15 The Department filed a motion to dismiss NIAAA's complaint pursuant to section 2-615 of the Code of Civil Procedure (Code). 735 ILCS 5/2-615 (West 2018). The Department argued that NIAAA failed to state any claim for which a writ of *mandamus* could be granted. In particular, the Department argued that the complaint did not establish "a clear right to relief, a clear duty to act, and clear authority to comply with the order" as is required to obtain this extraordinary relief. See *People ex rel. Glasgow v. Kinney*, 2012 IL 113197, ¶ 7. Following oral argument on the motion to dismiss, the circuit court granted the motion, thus dismissing NIAAA's complaint with prejudice. The circuit court found that the duties NIAAA was seeking to establish in its complaint were discretionary with the Department and that NIAAA was not entitled to an administrative hearing as to these matters as alleged in the complaint.

¶ 16 E. The Appellate Court's Opinion

¶ 17 The appellate court, in a published opinion, reversed the decision of the circuit court. 2022 IL App (2d) 200460, ¶ 48. Initially, the appellate court addressed NIAAA's motion to vacate the circuit court's dismissal of count III, which

requested a hearing on the Department's rejection of NIAAA's service provider designation, based on a recently adopted regulation. *Id.* ¶ 24 (citing 89 Ill. Adm. Code 230.420(d), amended at 45 Ill. Reg. 10780 (eff. Aug. 10, 2021)). This amendment to section 230.420(d)(2) provides that the Department will allow appeals by " '[a]ny AAA when the Department proposes to: *** [r]eject the AAA's recommendation to designate a service provider.' " *Id.* (quoting 89 Ill. Adm. Code 230.420(d), amended at 45 Ill. Reg. 10780 (eff. Aug. 10, 2021)). The appellate court found that, because the amendment contains "absolutely no language overcoming the presumption of prospective, rather than retroactive, application," the motion would be denied. *Id.* (citing *Doe Three v. Department of Public Health*, 2017 IL App (1st) 162548, ¶ 37).

¶ 18 Although the appellate court recognized that it was reviewing the order of thecircuit court that granted the Department's motion to dismiss NIAAA's complaintfor *mandamus*, it transitioned to conducting an administrative review of the Department's decision to deny NIAAA's petitions for a hearing. *Id.* ¶ 31. In so doing, the appellate court found it was reviewing "the administrative agency's decision, not the trial court's decision." *Id.* (citing *Kildeer-Countryside School District No. 96 v. Board of Trustees of the Teachers' Retirement System*, 2012 IL App (4th) 110843, ¶ 20). The appellate court then applied what it found to be the relevant provisions of the Procedure Act, finding that the Department's decisions did not comport with the requirements for final decisions set forth in section 10- 50(a) (5 ILCS 100/10-50(a) (West 2018)) because the Department's "summary dismissals of NIAAA's petitions and its

conclusory statements that the petitions failed to present contested cases were insufficient for meaningful judicial review."2022 IL App (2d) 200460, ¶¶ 32-33.

¶ 19 Finally, the appellate court examined NIAAA's petitions and, with respect to the second petition, determined that the Department's denial of approval of NIAAA's service provider designation presented a "question of fact," because the Department's regulations state that the Department would not do so "unreasonably." *Id.* ¶ 40 (citing 89 Ill. Adm. Code 270.215(b)(1) (2018)). The appellate court then determined that the Department's summary determination that NIAAA was not entitled to a hearing on its petitions constituted a failure "to grant a hearing where findings of fact and conclusion of law were determined after an opportunity to be heard." *Id.* ¶ 42. The appellate court found the Department was required to give NIAAA adjudicatory hearings and determine the merits of its petitions, that the Department had refused to do so, and that "the Department shall grant the NIAAA hearings and render decisions so that, if desired, administrative review may be perfected." *Id.* ¶ 43.

¶ 20 The appellate court concluded that NIAAA's first and second petitions presented "contested cases." *Id.* ¶ 47. It then vacated the order of the circuit court that granted the Department's motion to dismiss NIAAA's complaint for *mandamus*, vacated "the final decision by the Department," and remanded the case "to the Department for further review, evaluation, findings, and decision consistent with [its] opinion." *Id.* This court allowed the Department's petition for leave to appeal. Ill. S. Ct.

R. 315 (eff. Oct. 1, 2021).

¶ 21 II. ANALYSIS

¶ 22 A. Standard and Scope of Review for Section 2-615 Motion to Dismiss

¶ 23 The circuit court dismissed NIAAA's complaint for *mandamus* pursuant to section 2-615 of the Code. 735 ILCS 5/2-615 (West 2018). " 'A section 2-615 motion to dismiss tests the legal sufficiency of a complaint.' " *O'Connell v. County of Cook*, 2022 IL 127527, ¶ 18 (quoting *Patrick Engineering, Inc. v. City of Naperville*, 2012 IL 113148, ¶ 31). " 'In reviewing the sufficiency of a complaint, we accept as true all well-pleaded facts and all reasonable inferences that may be drawn from those facts,' and we 'construe the allegations in the complaint in the light most favorable to the plaintiff.' " *Id.* (quoting *Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 429 (2006). " '[A] cause of action should not be dismissed pursuant to section 2-615 unless it is clearly apparent that no set of facts can be proved that would entitle the plaintiff to recovery.' " *Id.* (quoting *Marshall*, 222 Ill. 2d at 429) Our standard of review for a dismissal under section 2-615 is *de novo*. *Id.* ¶ 19.

¶ 24 It is noteworthy that the appellate court reversed the circuit court's order that granted the Department's motion to dismiss. The effect of that reversal would be to reinstate the complaint in the circuit court, which had not been determined on the merits. See *Jackson v. Michael Reese Hospital &*

Medical Center, 294 Ill. App. 3d 1, 9 (1998) (the scope of review for a section 2-615 motion to dismiss is whether the complaint sufficiently states a cause of action, and the merits of the case are not considered). Thus, prior to affording the relief sought by NIAAA in the complaint for *mandamus*, further proceedings were required in the circuit court, including the filing of an answer and, absent the filing of dispositive motions, a hearing to adjudicate the truth of the matters alleged in the complaint. See *People ex rel. Commissioners of Big Lake Special Drainage District v. Dixon*, 346 Ill. 454, 460 (1931) (a proceeding for the writ of *mandamus* is an action at law, and the pleadings are governed by the same rules as apply to other actions at law).

¶ 25 Because the appellate court's opinion reversed the circuit court's order dismissing the complaint, further proceedings in the circuit court were required. Thus, the appellate court erred when it vacated "the Department's decision" and remanded the case to the Department with directions that the Department further review and evaluate NIAAA's petitions. In so doing, the appellate court prematurely granted relief to NIAAA without giving the Department the opportunity to answer the complaint or the circuit court the opportunity to consider the merits of the petition for *mandamus*. In other words, the appellate court treated the case as if it were reviewing it on its merits, rather than based on the adequacy of the pleadings alone.

¶ 26 B. Scope of Writ of *Mandamus*

¶ 27 Even if it were proper for the appellate

court to have remanded this cause to the Department, effectively granting relief to NIAAA prior to any proceeding on the merits of the complaint, we note that the directions the appellate court gave to the Department, for "further review, evaluation, findings, and decision consistent with [its] opinion," was not a proper writ of *mandamus*. *Mandamus* will lie in a proper case to compel performance of a specific act but may not be used to compel a general course of conduct. *People ex rel. Metropolitan Chicago Nursing Home Ass'n v. Walker*, 31 Ill. App. 3d 38, 41 (1975). An award of a writ of *mandamus* is improper where the duties involved are insufficiently specific or where issuance of the writ would require the court to assume supervision over a continuous course of official conduct. *Id.* Here, the appellate court did not direct the Department toward any specific action. It did not even require the rulemaking or "contested case" hearing that NIAAA was requesting in its complaint. Instead, it required the Department to further review and evaluate its decisions. This mandate lacks the specificity required of a writ of *mandamus*. See *id.*

¶ 28 ¶ 28 C. Vacatur and Remand to Department With Directions Was Error

¶ 29 For the foregoing reasons, we find that the appellate court erred in effectively granting substantive relief to NIAAA without a determination of the merits of the *mandamus* complaint by the circuit court. Furthermore, the directions the appellate court provided to the Department on remand did not constitute a proper writ of

mandamus. Having so found, we turn to a *de novo* review of the propriety of the appellate court's decision to reverse the circuit court's order dismissing NIAAA's complaint for *mandamus* pursuant to section 2-615 of the Code. 735 ILCS 5/2-615(West 2018).

¶ 30 D. Characterization and Elements of *Mandamus* Action

¶ 31 At the outset of our *de novo* review of the adequacy of NIAAA's complaint, it is important to note that the case before us is not one for administrative review of the Department's decisions with respect to NIAAA's funding and service provider designations, nor is it an action for administrative review of the Department's decisions to deny NIAAA's first and second petitions for an adjudicatory hearing that followed. In its complaint, NIAAA did not request administrative review of the Department's decisions, either under the Administrative Review Law (735 ILCS5/3-101 *et seq*. (West 2018)) or via a common-law writ of *certiorari* (see *Hanrahan*
v. Williams, 174 Ill. 2d 268, 272 (1996) ("[a] common law writ of *certiorari* is a general method for obtaining circuit court review of administrative actions when the act conferring power on the agency does not expressly adopt the Administrative Review Law and provides for no other method of review))."[3] Rather, NIAAA's complaint was one for a writ of *mandamus*.

¶ 32 The parameters of a writ of *mandamus* have been set forth by this court asfollows:

" '*Mandamus* is an extraordinary remedy to enforce, as a matter of right, "the performance of official duties by a public officer where no exercise of discretion on his part is involved." [Citation.]' [Citation]. 'A writ of *mandamus* will be awarded only if a plaintiff establishes a clear right to relief, a clear duty of the public official to act, and a clear authority in the public official to comply with the writ.' [Citation.] There also must be no other adequate remedy. [Citation.] *Mandamus* is improper if it substitutes the court's discretion or judgment for that of the official. [Citations.]' " *McHenry Township v. County of McHenry*, 2022 IL 127258, ¶ 59.

¶ 33 E. Count I of NIAAA's Complaint Is Moot(Dismissal Reinstated)

¶ 34 Based on the foregoing principles, our review of the legal sufficiency of NIAAA's complaint for a writ of *mandamus* turns on whether it has a clear right to the relief it seeks in the complaint. In count I of its complaint, NIAAA seeks to compel the Department to adopt rules pertaining to administrative hearings in accordance with article 10 of the Procedure Act. 5 ILCS 100/art. 10 (West 2018). NIAAA conceded at oral argument that, effective August 10, 2021, the Department enacted regulations that specifically require hearings before the Department to be conducted in accordance with article 10 of the Procedure Act. See 89 Ill. Adm. Code 230.400-230.495 (2021). Thus, no actual rights or interests of NIAAA remain, and it is impossible for the court to grant effectual relief to either party on count I of the complaint. Accordingly, we find that

count I is moot and note that NIAAA has not advanced any recognized exception to the mootness doctrine during these proceedings. Accordingly, we reinstate that portion of the circuit court's order that granted the Department's motion to dismiss count I of the *mandamus* complaint.[4] See *Jackson v. Peters*, 251 Ill. App. 3d 865, 867 (1993) ("[a] *mandamus* petition will be dismissed as moot if no actual rights or interests of the parties remain or if events occur that make it impossible for the court to grant effectual relief"). Having done so, we turn to the merits of the appellate court's decision to reverse the circuit court's order dismissing counts II and III of NIAAA's complaint for *mandamus*.

¶ 35 F. Counts II and III—Right to Hearing

¶ 36 In counts II and III respectively, NIAAA seeks to require the Department to conduct administrative hearings on its first and second petitions. These petitions requested the Department to reconsider its decisions to withhold Protective Act and/or "other funding" from NIAAA (count I) and to reject NIAAA's service provider designation (count II). To determine whether NIAAA has alleged sufficient facts showing it is clearly entitled to administrative hearings in these circumstances, as required to obtain a writ of *mandamus*, we turn to the ProcedureAct.

¶ 37 1. *The Administrative Procedure Act*

¶ 38 The Procedure Act applies to every agency, which is defined broadly to include each department of the State and each administrative unit of the State government that is created pursuant to statute. 5 ILCS 100/1-5, 1-20 (West 2018). Accordingly, the Department is subject to the Procedure Act, as it was created as an administrative unit of government pursuant to section 4 of the Illinois Act on the Aging (Act). 20 ILCS 105/4 (West 2018). Because article 10 of the Procedure Act (20 ILCS 100/art. 10 (West 2018)) governs administrative hearings, we look to that section to determine the sufficiency of NIAAA's complaint for *mandamus*, because NIAAA's contention that it is entitled to such relief is based on the claim that NIAAA has a clear right to an administrative hearing on its first and second petitions.

¶ 39 The circuit court found that NIAAA was not entitled to *mandamus* relief because the matters set forth in the first and second petitions did not constitute "contested cases" within the meaning of the Procedure Act. Nearly every section of article 10 of the Procedure Act limits its application to "contested cases." See, *e.g.*, 5 ILCS 100/10-5 (West 2018) (agencies must adopt rules establishing procedures for contested cases); *id.* § 10-15 (standard of proof for contested cases); *id.* § 10-20 (qualifications for administrative law judges for contested cases); *id.*

§ 10-25 (notice and hearing for contested cases); *id.* § 10-35 (record in contested cases); *id.* § 10-40 (rules of evidence for contested cases); *id.* § 10-45 (proposal for decision in contested cases); *id.* § 10-50 (decisions

and orders in contested cases). This is significant because the term "contested case" has a specific meaning when used in the Procedure Act. See *id.* § 1-10 (terms set forth in the definition sections of the Procedure Act have the meaning ascribed to them therein unless context otherwise requires). Thus, if the Department's funding and service provider designation decisions concerning NIAAA's status as an AAA and RAA qualify as a "contested case" within the meaning of the Procedure Act, then NIAAA may be entitled to relief. However, if they do not, NIAAA cannot demonstrate a clear right to a hearing, and its complaint for a writ of *mandamus* fails as a matter of law. See*McHenry Township*, 2022 IL 127258, ¶ 59.

¶ 40 The definition of "contested case" is set forth in section 1-30 of the ProcedureAct as follows:
" 'Contested case' means an *adjudicatory* proceeding (not including ratemaking, rulemaking, or quasi-legislative, informational, or similar proceedings) in which the individual legal rights, duties, or privileges of a party are *required by law to be determined by an agency only after an opportunity fora hearing*."
(Emphases added.) 5 ILCS 100/1-30 (West 2018).

¶ 41 Prior to the appellate court's opinion in this case, our appellate court's decisions have held that, in order to be entitled to a hearing before an administrative agency, and for an agency decision to thus come within the purview of article 10 of the Procedure Act, there must be some legal authority, in the form of a statute, constitutional right, or administrative regulation, that requires the agency to conduct a hearing when making the decision at issue. See *In re Medical License of Munoz*, 101 Ill. App. 3d 827, 829-30 (1981) (no hearing required

before a determination of whether an applicant for a medical license has passed the medical examination because the Medical Practice Act (Ill. Rev. Stat. 1977, ch. 111, ¶ 4401 *et seq.*) does not require a hearing); see also *Key Outdoor, Inc. v. Department of Transportation*, 322 Ill. App. 3d 316, 323 (2001) (no hearing required for a determination of whether a commercial driveway permit should be granted because the Highway Code (605 ILCS 5/1-101 *et seq.* (West 1998)) does not require a hearing); *Callahan v. Sledge*, 2012 IL App (4th) 110819, ¶ 29 (no hearing required for Central Management Services when reviewing insurance plan's denial of coverage for employee's medical expenses where no legal authority exists requiringsuch a hearing).

¶ 42 Without acknowledging or applying the holdings in these cases, nor explaining its departure from their reasoning, the appellate court, in conclusory fashion, determined that NIAAA was entitled to a hearing on the Department's funding and service provider decisions, finding that "it is patently obvious NIAAA was seeking a determination of its rights, duties, or privileges by seeking a hearing with the Department" and that, "[c]ontrary to the enunciated public policy recognizing that there should be some form of administrative review (5 ILCS 100/10-5 (West 2018)), the Department summarily determined that there was no need for a hearing." 2022 IL App (2d) 200460, ¶ 41. We note that section 10-5 of the Procedure Act does not, in fact, enunciate a public policy recognizing that there should be some form of administrative review. Rather, it requires agencies to adopt rules of procedure for "contested case[s]." 5 ILCS 100/10-5 (West 2018). This, of course, prompts the question as

to whether the subject matter of NIAAA's first and second petitions present "contested cases" as defined in section 1-30 of the Procedure Act. *Id.* § 1-30. As further explained below, we find that they do not.

¶ 43 As set forth above, and consistently applied by our appellate court prior to the appellate decision in this case, the plain language of section 1-30 of the Procedure Act makes clear that a "contested case," as used in the Procedure Act, is "*an adjudicatory proceeding* *** in which the individual legal rights, duties, or privileges of a party are *required by law to be determined by an agency only after an opportunity for a hearing*." (Emphases added.) *Id.* NIAAA's first and second petitions sought a hearing regarding the decisions of the Department to withhold funding from NIAAA by withholding its RAA status and to reject NIAAA's designated service providers in conjunction with its role as an RAA under the Protective Act. Thus, it follows that, to determine whether these decisions, which affected the rights, duties, or privileges of NIAAA as an RAA, were required to be determined by the Department only after an opportunity for a hearing, we must consider the sources of law governing the Department's decision-making. To that end, we examine the relevant statutory, regulatory, and constitutional provisions in turn.

¶ 44 2. *Statutory Sources of Right to Hearing*

¶ 45 The statutes of this state giving administrative agencies the authority to make decisions are replete with examples where decisions

are required to be rendered "after an opportunity for hearing." For example, a multitude of statutory directives require "an opportunity for hearing" prior to the denial or revocation of licenses by an administrative agency in a variety of contexts. See, *e.g.*, 20 ILCS 1605/10.1 (West 2020) (requiring "an opportunity for a hearing" within 30 days after the Department of the Lottery revokes a license); 215 ILCS 5/511.107 (West 2020) (requiring "an opportunity for hearing" before the Department of Insurance suspends or revokes the license of a third-party administrator); 210 ILCS 125/16.1 (West 2020) (requiring an "opportunity for a hearing" before the Department of Public Health revokes the license of a swimming facility). Similarly, many statutes require that enforcement penalties by administrative agencies be rendered only "after an opportunity for hearing." See, *e.g.*, 225 ILCS 345/16 (West 2020) (requiring "an opportunity to be heard" before the Department of Public Health imposes a fine or penalty upon a water well and pump installation contractor); 815 ILCS 307/10-55 (West 2020) (requiring an "opportunity for a hearing" before the Secretary of State imposes a fine upon a broker for a violation of the Illinois Business Broker Act of 1995). There are many other examples of decisions that are required to be made after "an opportunity for hearing" in Illinois statutes that confer powers on administrative agencies. Thus, it is evident to this court that, when the General Assembly intends to require a hearing before an agency makes an administrative decision, it does so explicitly and it does so in language precisely tracking section 1-30 of the Procedure Act. 5 ILCS 100/1-30 (West 2018). Thus, we turn to the statutes governing the Department's decisions here.

¶ 46 a. Enabling Legislation (Illinois Act on the Aging)

¶ 47 Section 4 of the Act creates the Department to administer programs related to " 'Services to Older People,' " as described by article VIII of " 'The Illinois Public Aid Code' " (see Ill. Rev. Stat. 1971, ch. 23, § 8-1 *et seq.* (repealed by Pub. Act 78- 242, art. 1, § 10 (eff. Nov. 9, 1973))), on the effective date of the Act, and to be "the single State agency for receiving and disbursing funds made available under the Older Americans Act" (42 U.S.C. § 3001 *et seq.* (2018)).[5] 20 ILCS 105/4 (West 2018). Additional powers and duties of the Department are set forth in section 4.01 of the Act (*id.* § 105/4.01). These include the duty and power to "evaluate all programs, services, and facilities for the aged and for minority senior citizens within the State and determine the extent to which present public or private programs, services and facilities meet the needs of the aged." *Id.* § 4.01(1).

¶ 48 As to funding, which was the subject of NIAAA's first petition, the Act gives the Department the duty and power "[t]o receive and disburse State and federal funds made available directly to the Department." *Id.* § 4.01(4). In addition, the Act gives the Department the duty and power to make grants to AAAs from the Meals on Wheels Fund (*id.* § 4.01(21)) and to "function as the sole State agency to receive and disburse State and federal funds for providing adult protective services in a domestic living situation in accordance with the [Protective Act]" (*id.* § 4.01(24)). There are no provisions in the

Act that pertain to approval of service provider designations, which is the subject of the second petition.

¶ 49 Notably absent from these provisions of the Act is any indication that the Department is to exercise these powers and duties "only after an opportunity for a hearing." In fact, the only mention of a hearing in these provisions is the requirement that the Department hold a public hearing regarding its development of guidelines for the organization and implementation of Volunteer Services Credit Programs to be administered by AAAs or community-based senior service organizations. *Id.* § 4.01(23). It is worth noting, then, that congruent with its other designations of administrative authority by statute, where the General Assembly has chosen to limit the discretion of the Department as to the powers and duties it outlines for the Department by requiring decisions to be made after a hearing, it has expressly stated this. In any event, having determined that nothing in the Act requires the Department to make the decisions complained of by NIAAA in its petitions only after an opportunity for hearing, we turn to the Protective Act (320 ILCS 20/1 *et seq.* (West 2018)).

¶ 50 b. Adult Protective Services Act

¶ 51 The Protective Act requires the Department to "establish, design, and managea protective services program for eligible adults who have been, or are alleged to be, victims of abuse, neglect, financial exploitation, or self-neglect. *Id.* § 3(a). To this end, the Department is to "contract with or fund, or contract with and fund, [RAAs], provider

agencies, or both, for the provision of those functions." *Id.* The Protective Act provides that the Department shall designate an AAA as the RAA or, in the event the AAA in that planning and service area is "deemed by the Department to be unwilling or unable to provide those functions, the Department may serve as the [RAA] or designate another qualified entity to serve as the [RAA]." *Id.* § 2(i). Importantly, the Protective Act provides that "any such designation shall be subject to terms set forth by the Department." *Id.* The Protective Act gives RAAs such as NIAAA the directive to designate provider agencies within its planning and service area "with prior approval by the Department." *Id.* § 3(b). There is no provision in the Protective Act requiring that such approval only be made "after an opportunity for a hearing."

¶ 52 c. No Statutory Right to Hearing

¶ 53 Having reviewed the statutory sources of authority relevant to the issues raised in NIAAA's complaint for *mandamus*, we find nothing in these provisions that requires that RAA designations, funding, or provider designations be made or approved by the Department after the opportunity for a hearing. Having found no statutory requirements for the Department to provide a hearing to NIAAA in these circumstances, we turn to the Department's regulations, for if the Department regulations provide that the determinations at issue were to be made after an opportunity for hearing, the petitions would have presented "contested cases" within the meaning of section 1-30 of the Procedure

Act (5 ILCS 100/1-30 (West 2018)), because they would be "required by law" to be determined "after an opportunity for a hearing."

¶ 54 d. Regulatory Sources of Right to a Hearing

¶ 55 At the time NIAAA filed its complaint for *mandamus*, the procedures for "appeals and fair hearings" before the Department were contained in sections 220.500 through 220.519 of the Department's regulations. 89 Ill. Adm. Code 220.500-220.519, repealed at 45 Ill. Reg. 10769 (eff. Aug. 10, 2021).[6] However, these sections did not specify which determinations by the Department were to be made after the opportunity for a hearing. Rather, provisions specifying which decisions the Department would make after the opportunity for a hearing were then, and remain, in section 230.410 of the Department's regulations. 89 Ill. Adm. Code 230.410, amended at 45 Ill. Reg. 10780 (eff. Aug. 10, 2021).

¶ 56 At the time NIAAA filed its complaint for *mandamus*, section 230.410 of the Department's regulations (*id.*) provided that the Department shall provide an opportunity for a hearing to an AAA when the Department proposes to (1) disapprove the area plan or any amendment to the area plan that has been submitted to the Department by the AAA or (2) withdraw from the agency designation as an AAA. In addition, that provision required a hearing for "[a]ny eligible applicant for designation as a planning and service area under the provisions

of [the Older Americans Act] whose application is denied" or any nutrition project that an area agency proposes to defund. 89 Ill. Adm. Code 230.410, amended at 5 Ill. Reg. 3722 (eff. Mar. 31, 1981), renumbered at 7 Ill. Reg. 5178 (eff. July 27, 1983). Thus, while applicable Department regulations set forth specific determinations by the Department where an AAA would be afforded a hearing, the determinations complained of in the first and second petitions, which involved funding decisions and service provider designations, were not included therein. Accordingly, the Department's regulations did not require the decisions at issue to be made only after an opportunity for a hearing.

¶ 57 e. Effect of Amended Section 230.420

¶ 58 Effective August 10, 2021, the aforementioned provisions were repealed and replaced with an amendment to section 230.420 of the Department's regulations, which provides the Department will allow appeals by, *inter alia*, an AAA when the Department proposes to "(1) [d]isapprove the area plan or any amendment to the area plan that has been submitted to the Department by the AAA; or (2) *[r]eject the AAA's recommendation to designate a service provider*." (Emphasis added.) 89 Ill. Adm. Code 230.420 (2021). In other words, if NIAAA's second petition, which challenged the Department's denial of NIAAA's service provider designation, had been brought after August 10, 2021, the petition would present a "contested case" within the meaning of section 1-30 of the Procedure Act (5 ILCS 100/1-30 (West 2018)).

¶ 59 After these amendments were put into place, NIAAA filed two motions in the appellate court to "vacate dismissal of Count III," which is the count of the complaint for *mandamus* that requested a hearing on the second petition. NIAAA filed a similar motion with this court. NIAAA makes two arguments as to why, based on this amendment alone, this court should affirm the appellate court's decision and require a hearing as to the second petition, which involved the Department's rejection of NIAAA's service provider recommendation.

¶ 60 First, NIAAA argues that, when the proposed amendment was published in the Illinois Register, the Department admitted to the Joint Committee on Administrative Rules that the prior regulation needed to be repealed because it was "outdated, confusing, duplicative, unnecessary, overlapping, and unnavigable." NIAAA argues that this was tantamount to an admission that the Department erred in applying the prior rule to deny NIAAA a hearing. Second, NIAAA argues that section 230.420, as amended to include a right to a hearing for a service provider recommendation, should be applied retroactively. We reject these arguments.

¶ 61 As to any statement made by an agent of the Department in advance of the rule change, we do not see any logic to the proposition that such a statement has any bearing on the retroactive impact on the amendment to the rule. Most importantly, there is nothing in the language of the amendment to support retroactive application. This court has stated that the policy considerations against retroactive

legislation apply with equal force to retroactive administrative regulations, which have the force of law. *Pressed Steel Car Co. v. Lyons*, 7 Ill. 2d 95, 106 (1955). An agency may, in proper cases, apply its administrative rule changes retroactively based on proper considerations, and a reviewing court may reject an administrative decision when the inequality of a retroactive application of an administrative regulation has not been counterbalanced by sufficiently significant state interests. *Gonzalez-Blanco v. Clayton*, 110 Ill. App. 3d 197, 204-05 (1982). However, NIAAA has provided no authority, and we are aware of none, for the proposition that a court can force retroactive application of an administrative regulation or that NIAAA has a clear right to a retroactive application of a regulation that is enforceable by a writ of *mandamus*.[7]

¶ 62 Even if NIAAA were clearly entitled to retroactive application of the amended rule providing it a right to appeal the Department's provider designation, we agree with the Department that NIAAA would not have a clear right to a hearing because its second petition was untimely under the Department's new regulations. Pursuant to the Department's regulations, all appeals other than those of "an older individual who is appealing the AAA's grievance response" must be submitted within 15 calendar days after notice of adverse action by the Department. Here, NIAAA received notice that the Department was rejecting its service provider designations on July 31, 2019, and filed the second petition on August 23, 2019, a period of 24 days. Accordingly, NIAAA does not have a clear right to a hearing on its second petition under the amended

regulations.

¶ 63 3. *Due Process Clauses*

¶ 64 Having found nothing in the relevant statutes and regulations that provides that the decisions by the Department regarding funding and service provider designations for AAAs or RAAs are to be made only after an opportunity for a hearing, we turn to the state and federal constitutions. The right to a hearing implicates the due process clauses of the United States and Illinois Constitutions, which protect against the deprivation of liberty or property without due process of law. U.S. Const., amend. XIV, Ill. Const. 1970, art. I, § 2. However, procedural due process protections are triggered only when a constitutionally protected liberty or property interest is at stake. *Hill v. Walker*, 241 Ill. 2d 479, 485 (2011) (citing *Greenholtz v. Inmates of the Nebraska Penal & Correctional Complex*, 442 U.S. 1, 7 (1979)). Accordingly, if NIAAA does not have a constitutionally protected interest in the "other funding" or its service provider designation, there can be no due process clause violation. See *id.* (citing *Wilson v. Bishop*, 82 Ill. 2d 364, 368 (1980)).

¶ 65 Here, NIAAA makes no argument that it has a life or liberty interest in the subjects of its petitions for hearing. Thus, the only potentially applicable interest NIAAA could have in the funding or service provider designation for which it seeks a hearing from the Department is a property interest. However, to have a property interest, there must be more than a unilateral expectation of the funding or approval of its service provider designations.

Groenings v. City of St. Charles, 215 Ill. App. 3d 295, 307 (1991) (citing *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972), and *Creekside Associates, Inc. v. City of Wood Dale*, 684 F. Supp. 201, 204 (N.D. Ill. 1989)). Rather, NIAAA must show a legitimate claim of entitlement to the funding or service provider designation for which it seeks a hearing. *Id.*

¶ 66 Applying these principles to the case at bar, we cannot say that NIAAA has a constitutionally protected property interest because NIAAA has not alleged facts explaining how, under objectively ascertainable criteria set forth in the law that limits the Department's discretion in some way, it is entitled to the "other funding" or service provider designation approval that it seeks. See *I-57 & Curtis, LLC v. Urbana & Champaign Sanitary District*, 2020 IL App (4th) 190850, ¶¶ 89-90 (absent protectable property interest, there can be no legally sufficient due process claim). Moreover, in its answer to the Department's petition for leave to appeal, on which it elected to stand as its brief, NIAAA does not enunciate any constitutional basis for affirming the appellate court's decision. Thus, it can be said to have forfeited any such argument. See Ill. S. Ct. R. 341(h), (i) (eff. Oct. 1, 2020) (points not argued are forfeited, and appellee brief must conform to this requirement).

¶ 67 Forfeiture notwithstanding, it does not appear that NIAAA could make a showing that it has a legitimate claim of entitlement to the funding or service provider designations for which it seeks hearings. As described above, the relevant statutes

and regulations grant the Department essentially unbridled discretion in administering the Protective Act and providing funding for programs for older Americans. See 20 ILCS 105/4.01 (West 2018). [8] Because there are no constitutionally protected interests at stake in the Department's funding and service provider designation decisions, NIAAA was not entitled to a hearing on these decisions under the due process clauses. See *Hill*, 241 Ill. 2d at 485 (citing *Greenholtz*, 442 U.S. at 7).

¶ 68 4. *Judicial Review of Agency Decisions Outside of "Contested Cases"*

¶ 69 Having found that NIAAA's petitions did not present "contested cases" requiring a hearing, we address briefly the appellate court's articulated concern that "the Department's summary dismissals of the NIAAA's petitions and its conclusory statements that the petitions failed to present contested cases were insufficient for meaningful judicial review." 2022 IL App (2d) 200460, ¶ 33; see also *Lucie B. v. Department of Human Services*, 2012 IL App (2d) 101284, ¶ 17. As we stated at the outset of our opinion, "[a] common law writ of *certiorari* is a general method for obtaining circuit court review of administrative actions when the act conferring power on the agency does not expressly adopt the Administrative Review Law and provides for no other form of review." *Hanrahan*, 174 Ill. 2d at 272. As previously noted, neither the Department's enabling legislation, the Act (20 ILCS 105/1 *et seq.* (West 2018)), nor the Protective Act (320 ILCS 20/1 *et seq.* (West 2018)) adopts the Administrative Review

Law. Accordingly, the common- law writ of *certiorari* is the available method of reviewing the Department's decisions. See *Hanrahan*, 174 Ill. 2d at 272.

¶ 70 The appellate court's decision presumes that NIAAA's decisions are subject to judicial review. As this court explained in *Hanrahan*, however, "whether, and to what extent, action by an administrative agency is reviewable is a question of statutory interpretation." *Id.* at 272-73 (citing *Greer v. Illinois Housing Development Authority*, 122 Ill. 2d 462, 497 (1988)). "While most agency actions are presumed reviewable, no presumption arises if there is a statutory bar to review or if statutory language commits the agency decision to unreviewable agency discretion." *Id.* (citing *Greer*, 122 Ill. 2d at 497). While there are several factors to consider in determining whether statutory language precludes judicial review, this determination is outside the scope of this court's review because NIAAA did not seek judicial review of the Department's decisions themselves but only the Department's denial of a hearing. See *People ex rel. Partee v. Murphy*, 133 Ill. 2d 402, 408 (1990) (this court declines to issue advisory opinions that resolve a question of law not presented by the facts of the case).

¶ 71 Although this court declines to address the issue of whether the Department's decisions that are at issue in this case are subject to judicial review, we note that, assuming they are, the rules of civil procedure apply to petitions for a writ of *certiorari*. See *Superior Coal Co. v. O'Brien*, 383 Ill. 394, 399-400 (1943) (the Civil Practice Act (Ill. Rev. Stat. 1941, ch. 110, § 1 *et seq.*) applies to all civil

proceedings, both at law and in equity, and includes every claim or demand which was not at the adoption of the constitution as an action at law or a suit in chancery). This means that, upon the filing of an appropriate writ of *certiorari*, the party challenging an agency decision would have all the rules of discovery available in civil actions at its disposal. Thus, the appellate court is incorrect in presuming that an administrative hearing is required for "meaningful judicial review" of an agency decision.

¶ 72 5. *Dismissal of Counts II and III of Mandamus Complaint Is Proper*

¶ 73 Counts I and II of NIAAA's complaint for *mandamus* seek to compel the Department to hold hearings on its 2014 funding decisions with respect to NIAAA's designation as an AAA, as well as its 2019 rejection of NIAAA's service provider designation, respectively. For the reasons set forth above, we hold that, to make a showing of clear entitlement to a hearing, a plaintiff must show that the decision presents a "contested case" as defined in section 1-30 of the Procedure Act. 5 ILCS 100/1-30 (West 2018). Pursuant to section 1-30, an administrative decision presents a "contested case" requiring a hearing if there is a source of law that requires the decision to be made after "the opportunity for a hearing." *Id.* Here, at the time these decisions were made, no statute, regulation, or constitutional provision required the decisions regarding funding AAAs or the approval of service provider designations by RAAs be made only after an opportunity for hearing. Accordingly, NIAAA cannot

adequately state a cause of action for *mandamus*, and the circuit court did not err in dismissing counts II and III of the complaint pursuant to section 2-615 of the Code. 735 ILCS 5/2-615 (West 2018).

¶ 74 III. CONCLUSION

¶ 75 For the foregoing reasons, we find that count I of NIAAA's complaint for *mandamus* is moot, and the circuit court properly dismissed counts II and III of the complaint because NIAAA cannot show a clear right to an administrative hearing on the matters set forth in its first and second petitions before the Department. Accordingly, we reverse the judgment of the appellate court and affirm the circuit court's judgment, which dismissed the complaint with prejudice.

¶ 76 Appellate court judgment reversed.

¶ 77 Circuit court judgment affirmed.

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[1]The Department revoked NIAAA's status as RAA for fiscal year 2014-15, but NIAAA hassince been reestablished as RAA for Planning Area 1.

[2]Although NIAAA's complaint for *mandamus* states that "*[i]nter alia*, the [i]nitial [p]etition alleges that the Department withheld [Older Americans Act] funding from NIAAA in violation of" section 3026(f)(2)(b) of the Older Americans Act (42 U.S.C.A. § 3026(f)(2)(b) (2012)) and states, "[i]t is believed the

Department withheld [Older Americans Act] funding from NIAAA," the first petition in fact makes no allegation regarding the Department's withholding Older Americans Act funding from NIAAA but, rather, alleges the Department terminated NIAAA's status as RAA under the Protective Act and withheld "other funding" from NIAAA, including funding from the Protective Act grant, which is consistent with the Department's termination of NIAAA as an RAA.

[3]Neither the Department's enabling legislation, the Illinois Act on Aging (20 ILCS 105/1 *et seq*. (West 2018)) nor the Protective Act (320 ILCS 20/1 *et seq*. (West 2018)) adopts the Administrative Review Law. Accordingly, to seek judicial review of the Department's decisions to "withhold funding" and reject NIAAA's service provider designations, NIAAA would need to file a common-law petition for a writ of *certiorari*. See *id.*

[4]The appellate court's disposition of the appeal left count I pending in the circuit court, although the appellate court did not remand the cause to the circuit court. This is because the appellate court reversed the circuit court's order dismissing all counts of the complaint but then remanded the cause to the Department for it to "further review and evaluate NIAAA's petitions." However, it did not require the Department to enact administrative regulations, which was the relief sought in count I. Because NIAAA did not cross-appeal this aspect of the appellate court's decision, it could be said that NIAAA has abandoned count I. In any event, we reinstate the circuit court's dismissal.

[5]Again, contrary to the allegations of the complaint, which is belied by the first petition itself, NIAAA does not allege that the Department withheld federal funds made available under the Older Americans Act without a hearing. Rather, the first petition alleges that the Department withheld unspecified "other funding," which is associated with the Department's removal of NIAAA as an RAA for fiscal year 2014-15 and thus seems to implicate Protective Act funding, rather than Older Americans Act funding.

[6]Sections 220.500 through 220.519 were repealed as of August 10, 2021, and replaced by regulations adopting procedures for hearings specific to program areas administered by the Department. For example, procedures for hearings specific to Older Americans Act programs are now set forth in sections 230.400 to 230.495. 89 Ill. Adm. Code 230.400-230.495 (2021).

[7]NIAAA provided no such authority in either motion "for judgment on Count III" or in itsanswer to the Department's petition for leave to appeal, which it elected to stand as its brief.

[8] The appellate court pointed to sections 270.215(b)(1) (89 Ill. Adm. Code 270.215(b)(1) (2018)) and 270.220(d) (*id.* § 270.220(d)) of the Department's regulations as support for its finding that NIAAA is entitled to a hearing on the Department's decision to reject NIAAA's service provider designation, as these provisions state that the Department will not make such rejections "unreasonably." However, these provisions do not change the discretionary nature of the Department's decisions or create a legitimate claim of entitlement to such designations in favor of NIAAA. See *I-57 & Curtis, LLC*, 2020 IL App (4th) 190850, ¶ 88 (citing *Bower Associates v. Town of Pleasant Valley*, 761 N.Y.S.2d 64, 68 (App. Div. 2003) (a protectable property interest arises only when an agency is required to grant approval of a request upon ascertainment that certain objectively ascertainable criteria have been met).

2022 IL App (2d) 200460
No. 2-20-0460
Opinion filed March 2, 2022

IN THE
APPELLATE COURT OF
ILLINOIS SECOND DISTRICT

Appeal from the Circuit Court of Winnebago County
No. 19-MR-1106
Honorable Donna R. Honzel
Judge, Presiding

GRANT NYHAMMER, as Executive Director of the Northwestern Illinois Area Agency on Aging,

Plaintiff-Appellant,

v.

Paula Basta, in Her Official Capacity as Director of Aging,

Defendant-Appellee.

JUSTICE McLAREN delivered the judgment of the court, with opinion. Presiding Justice Bridges and Justice Hutchinson concurred in the judgment and opinion.

OPINION

¶ 1 After the Illinois Department on Aging (Department) denied the Northwestern Illinois Area Agency on Aging (NIAAA) administrative hearings on two petitions, plaintiff, Grant Nyhammer, the NIAAA's executive director, filed a *mandamus* complaint seeking an order for hearings on the petitions and other relief. The trial court dismissed plaintiff's *mandamus* complaint for failure to state a cause of action. On appeal, plaintiff argues that the trial court erred by dismissing its complaint. For the reasons that follow, we vacate the trial court's order and remand the matter to the Department for rulings with findings of fact and conclusions of law regarding the NIAAA's two petitions.

¶ 2 I. BACKGROUND

¶ 3 A. The Parties

¶ 4 Defendant, Paula Basta, is the current director of the Department. The Department is mandated by the Adult Protective Services Act to "establish, design, and manage" a protective services program to assist eligible, adult victims of elder abuse, neglect, self-neglect, and exploitation. 320 ILCS 20/3(a) (West 2018). The Department designates area agencies on aging as regional administrative agencies. *Id.* § 2(i). A regional administrative agency is a public or nonprofit agency in a planning and service area that provides regional oversight in implementing Adult Protective Services Act programs in a geographical region of

the state. See *id.*

¶ 5 The Department designated the NIAAA as the regional administrative agency for planning and service area one.[1] The NIAAA is also the area agency on aging (AAA) for planning service and service area one.

> " 'Area agency on aging' means any public or non-profit private agency in a planning and service area designated by the Department, which is eligible for funds available under the Older Americans Act [(42 U.S.C. § 3001 *et seq.*)] and other funds made available by the State of Illinois or the federal government." 20 ILCS 105/3.07 (West 2018).

Plaintiff is the executive director of and general counsel for the NIAAA, a private nonprofit entity.

¶ 6 Under the Older Americans Act Amendments of 2006 (Older Americans Act) (42 U.S.C.

§ 3001 *et seq.* (2018)), the federal government distributes funds to the states each year. The states use these funds to provide a wide range of services to their " 'older individual[s],' " whom the statute defines as individuals "60 years of age or older." *Id.* § 3002(40). The Older Americans Act

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[1] Area one is comprised of the counties of Jo Daviess, Stephenson, Winnebago, Boone, Carroll, Ogle, De Kalb, Whiteside, and Lee. 20 ILCS 105/3.08 (West 2018).

requires each state to designate an agency responsible for creating a formula to determine the intrastate distribution of Older Americans Act funds. *Id.* § 3025(a)(1)(A). That state agency must, in turn, divide the state into subdivisions known as "planning and service areas" and must designate an AAA for each planning and service area. *Id.* § 3025(a)(2)(A); see also 20 ILCS 105/3.07, 3.08 (West 2018). In Illinois, the state agency is the Department. Illinois is divided into 13 planning and service areas. 20 ILCS 105/3.08 (West 2018).

¶ 7 B. Plaintiff's First Petition

¶ 8 In June 2019, the NIAAA, through plaintiff, filed a petition for a hearing with the Department, alleging that it was responsible for complying with the Older Americans Act and that the Department improperly withheld funding to the NIAAA. In particular, the petition alleged the following. In July 2013, plaintiff e-mailed defendant's predecessor, John Holton, stating that the Department's Adult Protective Services Standards and Procedures Manual (manual) was invalid because the Department enacted the manual without the public notice and comment requirements of the Illinois Administrative Procedure Act (Procedure Act). See 5 ILCS 100/5-40 (West 2012). In October 2013, plaintiff e-mailed Holton again, this time attaching a draft complaint for *mandamus* that the NIAAA was "considering filing" and stating that he hoped to "find a solution [short] of litigation."

¶ 9 In December 2013, Holton sent plaintiff a

letter stating that the Department was terminating the NIAAA's grant for fiscal year 2014, effective January 31, 2014, citing a provision of its grant agreement allowing the Department to cancel that agreement "without cause" upon 30 days' written notice. Holton stated that, as of February 1, 2014, the Department would take over as the regional administrative agency for area one.

¶ 10 In April 2019, plaintiff met with defendant and three Department employees, including Betsy Creamer. At the meeting, Creamer told plaintiff that she was given an order to "withhold funding from [the] NIAAA to retaliate for [the] NIAAA's advocacy regarding the Manual." Although Creamer did not say who gave that order, the NIAAA alleged that the Department awarded "$3.79 million in Other Funding" to other area agencies on aging in 2014-2015, while the NIAAA received nothing. The NIAAA sought a hearing on the alleged order to withhold funding, claiming that this was done in retaliation for plaintiff's complaints about the manual.

¶ 11 The nine-count petition alleged that (1) the Department failed to enact administrative rules that comply with article 10 of the Procedure Act (5 ILCS 100/10-5 through 10-75 (West 2018));

(2) the Department violated the Older Americans Act of 2006 by withholding funds from the NIAAA without, *inter alia*, providing due process; (3) the Department withheld funds from the NIAAA for an improper purpose and as retaliation; (4) by withholding funds from the NIAAA for an improper purpose, the Department violated the Older

Americans Act by failing to improve the capacity of serving older adults by concentrating resources, act in the clients' best interests, give preference to clients with the greatest economic need, and consider the needs of rural clients (42 U.S.C. §§ 3021(a)(1), 3025(a)(1)(D), 3025(a)(2)(E), 3027(a)(10)); (5) Creamer, acting under the color of state law, deprived the NIAAA of its federal due process right by withholding funds;

(6) the Department violated Illinois law by withholding funds from the NIAAA for the improper purpose of interfering with its State mandated advocacy responsibilities (89 Ill. Adm. Code 230.150, adopted at 5 Ill. Reg. 3722 (eff. Mar. 31, 1981)); (7) the Department violated Illinois law by retaliatorily) terminating the NIAAA as the regional administrative agency (Ill. Const. 1970, art. I, § 2; 320 ILCS 20/2(i) (West 2018)); (8) the Department violated Illinois law by improperly terminating the NIAAA as the regional administrative agency, because that action interfered with its state mandated advocacy responsibilities (89 Ill. Adm. Code 230.150, adopted at 5 Ill. Reg. 3722 (eff. Mar. 31, 1981)); and (9) the Department violated Illinois law by withholding funds from the NIAAA under the order given to Creamer.

¶ 12 In July 2019, the Department denied the NIAAA a hearing on its first petition, stating in an e-mail that the petition did not present a contested case.

¶ 13 C. The NIAAA's Second Petition

¶ 14 In August 2019, the NIAAA, through plaintiff, filed a second petition for a hearing with the Department. This second, five-count petition alleged the following. The Department designated the NIAAA as the AAA for planning service area one and the regional administrative agency for the adult protective services program for area one. As the regional administrative agency for the adult protective services program (program), the NIAAA had broad authority to manage the program, including designating program providers. The Department rejected the NIAAA's designations of providers and, in doing so, improperly intruded on the NIAAA's authority granted by the Illinois General Assembly. In addition, the Department used conflicting standards to govern the program by rejecting the NIAAA's designation and unlawfully managed the program with invalid rules. Also, the Department had no administrative rules for hearings that comply with the Procedure Act, which prevented the NIAAA from receiving a fair hearing on this petition. In June 2019, the NIAAA "designated" adult protective service providers for area one. In July 2019, the Department, through defendant, sent a letter to the NIAAA, stating that it rejected its "recommendations" of providers because of "errors in the instructions and application used for scoring purposes."

¶ 15 Count I of the NIAAA's second petition alleged that the Department violated the Adult Protective Services Act by rejecting the NIAAA's designation of providers, in violation of section 3(b) of the Adult Protective Services Act (320 ILCS 20/3(b) (West 2018)). Count II alleged that the Department unreasonably rejected the NIAAA's designation of providers, in violation of Title 89, Part 270, of the Illinois Administrative Code (89 Ill. Adm. Code 270). Count III alleged that the Department "tainted the process" by unlawfully rejecting the NIAAA's designation of providers. Count IV alleged that the manual was not adopted under the rulemaking process specified in the Procedure Act. Count V alleged that the Department did not have administrative rules for contested hearings that comply with article 10 the Procedure Act.

¶ 16 In September 2019, the Department denied the NIAAA a hearing, again via e-mail, stating that the second petition "did not present a contested case that would support the right to an adjudicatory hearing."

¶ 17 D. Plaintiff's *Mandamus* Complaint

¶ 18 On November 5, 2019, plaintiff filed a three-count *mandamus* action against defendant in the trial court. Count I alleged that the Department had a legal duty to enact administrative rules for hearings that complied with article 10 of the Procedure Act and that defendant had not enacted such rules. See 5 ILCS 100/10-5 through 10-75 (West 2018).

¶ 19 Count II alleged that the Department had a duty to provide plaintiff with an administrative hearing on the first petition. Plaintiff incorporated paragraphs of the first petition into count II and attached the first petition to the complaint. The first petition alleged that in July 2013 plaintiff sent an e-mail to the current director of the Department, John Holton. Plaintiff stated that the Department's new manual was invalid and that it should be recalled. In October 2013, plaintiff e-mailed Holton, stating that the NIAAA was considering litigation regarding the manual. In December 2013, Holton sent a letter to plaintiff, stating that the Department was terminating the NIAAA as the regional AAA effective February 1, 2014. The NIAAA received no funding from the Department for fiscal year 2014-2015. The Department improperly withheld funding for the purpose of retaliation. The first petition also alleged that the Department failed to enact administrative rules for hearings that complied with article 10 of the Procedure Act. See *id.*

¶ 20 Count III alleged that the Department had a duty to provide the NIAAA with an administrative hearing on its second petition. Plaintiff incorporated paragraphs of the second petition into III three and attached the second petition to the complaint.

¶ 21 On February 28, 2020, after hearing argument, the trial court dismissed plaintiff's complaint pursuant to section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 2018)). Plaintiff filed a "motion to vacate," which the court

denied as a motion to reconsider on July 29, 2020. Plaintiff filed a timely notice of appeal on August 17, 2020.

¶ 22 II. ANALYSIS

¶ 23 A. Initial Matters

¶ 24 Initially, we address plaintiff's motion to vacate the trial court's dismissal of count III based on a recently adopted regulation. See 89 Ill. Adm. Code 230.420(d), amended at 45 Ill. Reg. 10780 (eff. Aug. 10, 2021). The recently adopted amendment to section 230.420(d)(2) provides that the Department will allow appeals by "[a]ny AAA when the Department proposes to: *** [r]eject the AAA's recommendation to designate a service provider." *Id.* Here, there is absolutely no language overcoming the presumption of prospective, rather than retroactive, application. See *Doe Three v. Department of Public Health*, 2017 IL App (1st) 162548, ¶ 37 (the appellate court applied an administrative regulation prospectively because there was no language suggesting retroactivity). Therefore, we deny plaintiff's motion.

¶ 25 In a related motion, plaintiff seeks sanctions against defendant and counsel pursuant to Illinois Supreme Court Rule 137 (eff. Jan. 1, 2018) and Rule 361 (eff. Dec. 1, 2021) for delaying this litigation, making false representations to this court, and concealing the implementation of the recently adopted regulation (see 45 Ill. Reg. 10780 (eff. Aug. 10, 2021)). Plaintiff's motion is premised on the false belief that the recently adopted

regulation applies retroactively. Because the enactment of the regulation at issue is not retroactive, it does not affect this litigation, and thus, wedeny plaintiff's motion for sanctions.

¶ 26 B. Standard of Review

¶ 27 Our review in this appeal is guided by the procedural context from which it arose, a motion to dismiss under section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 2018)). Motions to dismiss under section 2-615 challenge the legal sufficiency of a complaint, based on defects apparent on its face. *Ferris, Thompson & Zweig, Ltd. v. Esposito*, 2017 IL 121297, ¶ 5. When reviewing whether a motion to dismiss under section 2-615 should have been granted, we accept as true all well-pleaded facts and all reasonable inferences that may be drawn from those facts. *Id.* The critical inquiry is whether the allegations of the complaint, when construed in the light most favorable to the plaintiff, are sufficient to establish a cause of action upon which relief may be granted. *Id.* A cause of action should not be dismissed pursuant to section 2-615 unless it is clearly apparent that no set of facts can be proved that would entitle the plaintiff to recover. *Id.* An exhibit attached to a complaint becomes part of the pleading for every purpose, including the decision on a motion to dismiss. *Invenergy Nelson LLC v. Rock Falls Township High School District No. 301*, 2020 IL App (2d) 190374, ¶ 14. Where an exhibit contradicts the allegations in a complaint, the exhibit controls. *Id.* Whether the trial court erred in granting or denying a section 2-615 motion

presents a question of law and, therefore, our review is *de novo*. *Ferris, Thompson & Zweig, Ltd.*, 2017 IL 121297, ¶ 5.

¶ 28 C. *Mandamus*

¶ 29 *Mandamus* is an "extraordinary remedy" that compels a public official to perform a purely ministerial duty that does not involve an exercise of discretion. *People ex rel. Berlin v. Bakalis*, 2018 IL 122435, ¶ 16. A court will award *mandamus* relief only when the plaintiff " 'establishes a clear right to the relief requested, a clear duty of the public official to act, and clear authority in the public official to comply.' " (Internal quotation marks omitted.) *Id.* (quoting *People ex rel. Glasgow v. Carlson*, 2016 IL 120544, ¶ 15).

¶ 30 D. Administrative Review

¶ 31 With administrative cases, we review the administrative agency's decision, not the trial court's decision. *Kildeer-Countryside School District No. 96 v. Board of Trustees of the Teachers' Retirement System*, 2012 IL App (4th) 110843, ¶ 20. The applicable standard of review depends on whether the question presented is one of fact, one of law, or a mixed question of fact and law. *Kouzoukas v. Retirement Board of the Policemen's Annuity & Benefit Fund of the City of Chicago*, 234 Ill. 2d 446, 463 (2009). An administrative agency's decision on a question of law is not binding on a reviewing court and is subject to *de novo* review. *Engle v. Department of Financial & Professional Regulation*, 2018 IL App (1st) 162602, ¶ 29. In

contrast, we will not disturb an agency's findings of fact unless they are against the manifest weight of the evidence. *Id.* ¶ 30. Finally, an agency's conclusion on a mixed question of fact and law is reviewed for clearerror. *Id.* ¶ 31.

¶ 32 Further, when, as here, an agency is subject to the Procedure Act, a final decision by the agency "shall include findings of fact and conclusions of law, separately stated. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings." 5 ILCS 100/10-50(a) (West 2018). "Therefore, while an agency is not required to make a finding on each evidentiary fact or claim, its findings must be specific enough to permit an intelligent review of its decision." *Lucie B. v. Department of Human Services*, 2012 IL App (2d) 101284, ¶ 17.

¶ 33 Here, we determine that the Department's summary dismissals of the NIAAA's petitions and its conclusory statements that the petitions failed to present contested cases were insufficient for meaningful judicial review. A decision that contains no findings of facts "is simply insufficient

to permit an intelligent review of that decision." *Violette v. Department of Healthcare & Family Services*, 388 Ill. App. 3d 1108, 1112 (2009).

¶ 34 Defendant argues that the Procedure Act only requires the Department to "adopt rules establishing procedures for contested case hearings." See 5 ILCS 100/10-5 (West 2018). Defendant notes that a contested case is defined as "an adjudicatory proceeding *** in which the individual legal rights, duties, or privileges of a party are required by law to be determined by an agency only after an opportunity for a hearing." *Id.* § 1-30.

¶ 35 Both petitions alleged, *inter alia*, that the Department failed to comply with the Procedure Act because it did not implement rules for administrative hearings as required in article 10 (5 ILCS100/10-5 through 10-75 (West 2018)).

¶ 36 The Procedure Act's provisions apply to the Department. 20 ILCS 105/5.02 (West 2018) ("The provisions of the Illinois Administrative Procedure Act [(5 ILCS 100/1-1 *et seq.*)] are hereby expressly adopted and shall apply to all administrative rules and procedures of the Department under this Act ***."). The Procedure Act provides that "each agency shall *** adopt rules of practice setting forth the nature and requirements of all formal hearings." 5 ILCS 100/5-10(a) (West 2018). Section 10-5 of the Procedure Act states, "[a]ll agencies *shall* adopt rules establishing procedures for contested case hearings." (Emphasis added.) *Id.* § 10-5. Section 10-10 provides, "[a]ll agency rules

establishing procedures for contested cases *shall* at a minimum comply with the provisions of this Article 10." (Emphasis added.) *Id.* § 10-10.

¶ 37 The NIAAA alleged that defendant failed to adopt administrative rules for hearings that complied with article 10 of the Procedure Act for:

> "a. The qualifications of administrative law judges [(*id.* § 10-20)];
>
> b. The necessary details required in a hearing notice [(*id.* § 10-25)];
>
> c. The disqualification of an administrative law judge [(*id.* § 10-30(b))];
>
> d. Bias or conflict of interest [(*id.*)];
>
> e. What must be included in the record for a contested hearing [(*id.* § 10-35)];
>
> f. The rules of evidence at a hearing [(*id.* § 10-40)];
>
> g. The proposal for decision [(*id.* § 10-45)];
>
> h. What must be in the decision and orders [(*id.* § 10-50)];
>
> i. Expenses and attorney fees in contested hearings [(*id.* § 10-55)];
>
> j. *Ex parte* communications after a notice of hearing [(*id.* § 10-60)];

k. Staying contested hearings for military service [(*id.* § 10-63)];

l. Waiving compliance with [the Procedure Act] [(*id.* § 10-70)]; and

m. Service by email [(*id.* § 10-75)]."

¶ 38 Defendant argues that the Department had no obligation to enact rules pursuant to article 10 of the Procedure Act because the NIAAA had no right to hearings on its first and second petitions. Thus, defendant does not dispute that the Department failed to enact the rules at issue. The Department argues only that the NIAAA was not entitled to hearings because the petitions failed to present a contested case.

¶ 39 The NIAAA's first petition alleged, *inter alia*, that the Department withdrew funding and terminated the NIAAA as an adult service provider for an improper purpose. The NIAAA alleged that the Department took these actions to retaliate against plaintiff after plaintiff told the Department's executive director that the Department's manual was invalid because it was enacted without the public notice and comment requirements of the Procedure Act. See *id.* § 5-40.

¶ 40 The NIAAA's second petition alleged that the Department improperly denied approval of the NIAAA's recommended providers. Section 270.215(b)(1) of the Department's regulations is

instructive. That section provides "[t]he Department reserves the right to *** reject recommendations *** of a regional administrative agency in the designation of *** provider agencies; however, the Department will not do so *unreasonably*." (Emphasis added.) 89 Ill. Adm. Code 270.215(b)(1) (2018). The Department's regulations further provide that its approval "shall not be *unreasonably* withheld." (Emphasis added). *Id.* § 270.220(d). Generally, whether a party acted reasonably is a question of fact. See, *e.g.*, *Cole v. Byrd*, 167 Ill. 2d 128, 136-37 (1995) (stating whether medical expenses are reasonable is a question of fact); *Wells v. State Farm Fire & Casualty Insurance Co.*, 2021 IL App (5th) 190460, ¶37 ("whether a party has employed *** 'reasonable efforts' is a question of fact"). However, here, the Department made no findings of fact and there was no hearing to allow the presentation of evidence regarding the allegedly unreasonable action.

¶ 41 Here, it is patently obvious that the NIAAA was seeking a determination of its rights, duties, or privileges by seeking a hearing with the Department. Contrary to the enunciated public policy recognizing that there should be some form of administrative review (5 ILCS 100/10-5 (West 2018)), the Department summarily determined that there was no need for a hearing. The Department denied the NIAAA's petitions without investigation, findings, or explanation, but somehow concluded that the petitions failed to present contested cases.

¶ 42 In doing so, the Department failed and refused to provide a means for administrative review for the determination of the NIAAA's rights, duties, and responsibilities because it failed to grant a hearing where findings of fact and conclusions of law were determined after an opportunity to be heard. See *id.* § 1-30. The Department dismissed the petitions without providing any means to effectively appeal or review the decisions and without enacting rules to even validate its actions. We do not believe that the legislature ever intended a system for the adjudication of rights, duties, or privileges as simplistic as conceived by the Department.

¶ 43 The Department was required to give the NIAAA adjudicatory hearings and determine the merits of its petitions. It refused to do so. We determine that the Department shall grant the NIAAA hearings and render decisions so that, if desired, administrative review may be perfected.

¶ 44 E. Delay in Proceedings

¶ 45 Finally, plaintiff argues that the trial court erred by unnecessarily causing delays in the resolution of this matter. Because we are reversing and remanding for a hearing on plaintiff's petitions, we need not address this argument.

¶ 46 III. CONCLUSION

¶ 47 In conclusion, plaintiff's first and second petitions presented contested cases. Therefore, for the foregoing reasons, the order of the circuit court

of Winnebago County is reversed, the final decision by the Department is vacated, and this cause is remanded to the Department for further review, evaluation, findings, and decision consistent with this opinion.

¶ 48 Circuit court judgment reversed.

¶ 49 Department decision vacated and remanded.

Case # 2019-MR-1106
STATE OF ILLINOIS
IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT COUNTY OF WINNEBAGO

Grant Nyhammer as Executive Director of the Northwestern Illinois Area Agency on Aging.
Plaintiff,
v.
Paula Basta, in here capacity as the Director of the Illinois Department on Aging,
Defendant.

ORDER

This matter coming before the Court on Defendant's Motion to Dismiss, the Court having considered the written and oral arguments of the Parties and further being fully advised, it is hereby ordered:

The Motion is granted for the reasons stated on the record and the Complaint for Mandamus is dismissed with prejudice.

Enter: 2/28/2020
Judge: /s/ Donna Honzel

SUPREME COURT OF ILLINOIS
SUPREME COURT BUILDING
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Cynthia A. Grant
Clerk of the Court
(217) 782-2035
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January 23, 2023

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

In re: Nyhammer v. Basta 128354

Dear Timothy Scordato:

The Supreme Court today entered the following order in the above-entitled cause:

Petition for Rehearing Denied.

The mandate of this Court will issue to the Appellate Court and/or Circuit Court or other agency on 02/27/2023.

Very truly yours,

/s Cynthia A. Grant

Clerk of the Supreme Court

Cc: Appellate Court, Second District
Attorney General of Illinois – Civil Division
Carson Reid Griffis

FILED
Date: 7/21/20
Thomas A. Klein
Clerk of the Circuit Court
By TRAC Deputy
Winnebago County, IL

STATE OF ILLINOIS
CIRCUIT COURT
SEVENTEENTH JUDICIAL CIRCUIT

DONNA R. HONZEL
Associate Judge

Winnebago County Courthouse
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July 20, 2020

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Nyhammer vs. Basta
2019-MR-1106

MEMORANDUM OF DECISION AS TO PLAINTIFF's "MOTION TO VACATE" (sic) ie MOTION TO RECONSIDER

Plaintiff alleges the court ignored that it must accept as true all well-pleaded facts of a complaint. In so doing, it is plaintiff who ignores that "well-pleaded facts" do not include legal conclusions or speculation. The plaintiff additionally sets forth alleged "factual errors" by the court which take liberties with what the court actually said in making its ruling. A party must strive to be sure it does not mischaracterize what the court has said for one example, plaintiff claims the court said the NIAAA is not entitled to funding from the defendant (paragraph g). What the court actually said was that, "there is not a substantive right in funds that you, one, are not guaranteed and, two, are discretionary based on a whole lot of factors." None of the alleged "factual errors" are actual quotes and in large part are taken out of context. In any event, there's no need to belabor this allegation of error. The court has reviewed the allegations and do not find "factual errors" that serve to reverse the court's prior denial of mandamus.

Plaintiff also alleges a variety of "mistakes of law" and enumerates them as provisions the court

disregarded. The case in subparagraph (a) pertains to public assistance payments to welfare recipients and is not applicable so it is not a mistake of law for the court not to have followed it. Paragraphs (b) and (c) cite to 42 U.S.C. section 3026 subparts and (d) which is 45 CFR section 132 l.63(b). The court did not disregard these sections but the allegations of the complaint, which refer to a petition, does not provide well-pleaded facts that any OAA funds were withheld. There is an admittedly speculative allegation of a belief OAA funding may have been withheld in 2014 but nothing plead to support the speculation. Conversely, plaintiff did attach to the complaint and incorporate into it petitions previously filed. In the first one, Exhibit 2 to the complaint, marked as Exhibit C therein, is a December 30, 2013 letter from IDOA indicating termination of a particular grant that was to take effect January 31, 20 I 4. This is non-speculative support for the fact discretionary **non**-OAA funding ceased in 2014 in accord with the IDOA's authority. Contrary to plaintiffs assertions, the court did consider these sections but found no well-plead facts which would support mandamus. In fact, plaintiffs own exhibit belied the allegation that it had a "belief' OAA funding had been withheld in 2014.

Paragraphs e, f, and g, do not apply to this complaint. As for paragraph (h) the defendant does have rules, so this section (it's actually subsection a not b) does not apply either. Paragraphs (i) - (n) refer to "contested cases" and the pleadings do not support the statutory definition of a "contested

case." 5 ILCS 100/1-30 states that "Contested case" means "an adJud1catory proceeding (not including ratemaking, rulemaking, or quasi-legislative, informational, or similar proceedings) in which mdividual rights, duties or privileges of a party are required by law to be determined by an agency only after opportunity for a hearing." Finally, paragraph (o) is a section referring to an area plan that's been disapproved which is also not a subject of the pleading at issue. Plaintiff is mistaken about the "mistakes of law" alleged to have occurred; none of these allegations support reversal of the denial of mandamus.

Plaintiff states that the court "expressed that the likelihood of plaintiff prevailing on the initial petition and the APS petition ... is a reason for denying the mandamus" and that the court "said that the dismissal was warranted because the defendant will prevail on the petitions .... " These words were simply never uttered by the court. Counsel should always be cautious about attributing statements to the court and must take great care not to do so inaccurately. Taking liberties with the court's words and putting one's own spin on them is unacceptable and a violation of the Rules of Professional Conduct Rule 3 .3.

Plaintiff states the Court "seemed confused" about whose interests NIAAA is representing. That completely ignores the court's comments about the 2.3 million older Americans that are citizens of this region *(sic)* and the need for their welfare to be provided for as well as its encouragement

for the parties to communicate to get past some of the concerns of the plaintiff (pp 25-27 of the transcript).

Contrary to plaintiff's allegations in his motion, the court considered the entirety of the materials provided it, the law and the well-pleaded facts. The court explained that mandamus is an extraordinary remedy for acts in violation of mandatory requirements. The court explained that acts which are discretionary in nature do not provide a plaintiff substantive rights which mandamus may apply to.

The "Motion to Vacate" ie "Motion to Reconsider" is denied.

SO ORDERED:

July 20, 2020

s/ Donna Honzel
Judge Donna R. Honzel

42 U.S.C. § 3001 Congressional declaration of objectives

The Congress hereby finds and declares that, in keeping with the traditional American concept of the inherent dignity of the individual in our democratic society, the older people of our Nation are entitled to, and it is the joint and several duty and responsibility of the governments of the United States, of the several States and their political subdivisions, and of Indian tribes to assist our older people to secure equal opportunity to the full and free enjoyment of the following objectives:

(1) An adequate income in retirement in accordance with the American standard of living.

(2) The best possible physical and mental health (including access to person-centered, trauma-informed services as appropriate) which science can make available and without regard to economic status.

(3) Obtaining and maintaining suitable housing, independently selected, designed and located with reference to special needs and available at costs which older citizens can afford.

(4) Full restoration services for those who require institutional care, and a comprehensive array of community-based, long-term care services adequate to appropriately sustain older people in their communities and in their homes, including support to family members and other persons providing voluntary care to older individuals needing long-term care services.

(5) Opportunity for employment with no discriminatory personnel practices because of age.

(6) Retirement in health, honor, dignity—after years of contribution to the economy.

(7) Participating in and contributing to meaningful activity within the widest range of civic, cultural, education and training and recreational opportunities.

(8) Efficient community services, including access to low-cost transportation, which provide a choice in supported living arrangements and social assistance in a coordinated manner and which are readily available when needed, with emphasis on maintaining a continuum of care for vulnerable older individuals.

(9) Immediate benefit from proven research knowledge which can sustain and improve health and happiness.

(10) Freedom, independence, and the free exercise of individual initiative in planning and managing their own lives, full participation in the planning and operation of community-based services and programs provided for their benefit, and protection against abuse, neglect, and exploitation.

42 U.S.C. § 3021 – Purpose and program

(a) CONGRESSIONAL DECLARATION OF PURPOSE

(1) It is the purpose of this subchapter to encourage and assist State agencies and area agencies on aging to concentrate resources in order to develop greater capacity and foster the development and implementation of comprehensive and coordinated systems to serve older individuals by entering into new cooperative arrangements in each State with the persons described in paragraph (2), for the planning, and for the provision of, supportive

services, and multipurpose senior centers, in order to—

(A) secure and maintain maximum independence and dignity in a home environment for older individuals capable of self care with appropriate supportive services;

(B) remove individual and social barriers to economic and personal independence for older individuals;

(C) provide a continuum of care for vulnerable older individuals;

(D) secure the opportunity for older individuals to receive managed in-home and community-based long-term care services; and

(E) measure impacts related to social determinants of health of older individuals.

42 U.S.C. § 3025 – Designation of State agencies

(a) DUTIES OF DESIGNATED AGENCY In order for a State to be eligible to participate in programs of grants to States from allotments under this subchapter—

(1) the State shall, in accordance with regulations of the Assistant Secretary, designate a State agency as the sole State agency to—

(A) develop a State plan to be submitted to the Assistant Secretary for approval under section 3027 of this title;

(B) administer the State plan within such State;

(C) be primarily responsible for the planning, policy development, administration, coordination, priority setting, and evaluation

of all State activities related to the objectives of this chapter;

(D) serve as an effective and visible advocate for older individuals by reviewing and commenting upon all State plans, budgets, and policies which affect older individuals and providing technical assistance to any agency, organization, association, or individual representing the needs of older individuals; and

(E) divide the State into distinct planning and service areas (or in the case of a State specified in subsection (b)(5)(A), designate the entire State as a single planning and service area), in accordance with guidelines issued by the Assistant Secretary, after considering the geographical distribution of older individuals in the State, the incidence of the need for supportive services, nutrition services, multipurpose senior centers, and legal assistance, the distribution of older individuals who have greatest economic need (with particular attention to low-income older individuals, including low-income minority older individuals, older individuals with limited English proficiency, and older individuals residing in rural areas) residing in such areas, the distribution of older individuals who have greatest social need (with particular attention to low-income older individuals, including low-income minority older individuals, older individuals with limited English proficiency, and older individuals residing in rural areas)

residing in such areas, the distribution of older individuals who are Indians residing in such areas, the distribution of resources available to provide such services or centers, the boundaries of existing areas within the State which were drawn for the planning or administration of supportive services programs, the location of units of general purpose local government within the State, and any other relevant factors;

(2) the State agency shall—

(A) except as provided in subsection (b)(5), designate for each such area after consideration of the views offered by the unit or units of general purpose local government in such area, a public or private nonprofit agency or organization as the area agency on aging for such area;

(B) provide assurances, satisfactory to the Assistant Secretary, that the State agency will take into account, in connection with matters of general policy arising in the development and administration of the State plan for any fiscal year, the views of recipients of supportive services or nutrition services, or individuals using multipurpose senior centers provided under such plan;

(C) in consultation with area agencies, in accordance with guidelines issued by the Assistant Secretary, and using the best available data, develop and publish for review and comment a formula for distribution within the State of funds received under this subchapter that takes into account—

(i) the geographical distribution of older individuals in the State; and

(ii) the distribution among planning and service areas of older individuals with greatest economic need and older individuals with greatest social need, with particular attention to low-income minority older individuals;

(D) submit its formula developed under subparagraph (C) to the Assistant Secretary for approval;

(E) provide assurances that preference will be given to providing services to older individuals with greatest economic need and older individuals with greatest social need (with particular attention to low-income older individuals, including low-income minority older individuals, older individuals with limited English proficiency, and older individuals residing in rural areas), and include proposed methods of carrying out the preference in the State plan;

(F) provide assurances that the State agency will require use of outreach efforts described in section 3027(a)(16) of this title; and

(G)

(i) set specific objectives, in consultation with area agencies on aging, for each planning and service area for providing services funded under this subchapter to low-income minority older individuals and older individuals residing in rural areas;

(ii) provide an assurance that the State agency will undertake specific program development, advocacy, and outreach efforts focused on the needs of low-income minority older individuals and older individuals residing in rural areas; and

(iii) provide a description of the efforts described in clause (ii) that will be undertaken by the State agency; and

(3) the State agency shall, consistent with this section, promote the development and implementation of a State system of long-term care that is a comprehensive, coordinated system that enables older individuals to receive long-term care in home and community-based settings, in a manner responsive to the needs and preferences of the older individuals and their family caregivers, by—

(A) collaborating, coordinating, and consulting with other agencies in such State responsible for formulating, implementing, and administering programs, benefits, and services related to providing long-term care;

(B) participating in any State government activities concerning long-term care, including reviewing and commenting on any State rules, regulations, and policies related to long-term care;

(C)conducting analyses and making recommendations with respect to strategies for modifying the State system of long-term care to better—

(i) respond to the needs and preferences of older individuals and family caregivers;

(ii) facilitate the provision, by service providers, of long-term care in home and community-based settings; and

(iii) target services to individuals at risk for institutional placement, to permit such individuals to remain in home and community-based settings;

(D) implementing (through area agencies on aging, service providers, and such other entities as the State determines to be appropriate) evidence-based programs to assist older individuals and their family caregivers in learning about and making behavioral changes intended to reduce the risk of injury, disease, and disability among older individuals; and

(E) providing for the availability and distribution (through public education campaigns, Aging and Disability Resource Centers, area agencies on aging, and other appropriate means) of information relating to—

(i) the need to plan in advance for long-term care; and

(ii) the full range of available public and private long-term
care (including integrated long-term care) programs, options, service providers, and resources.

(b) PLANNING AND SERVICE AREAS

(1) In carrying out the requirement of subsection (a)(1), the State may designate as a planning and service area any unit of general purpose local government which has a population of 100,000 or more. In any case in which a unit of general

purpose local government makes application to the State agency under the preceding sentence to be designated as a planning and service area, the State agency shall, upon request, provide an opportunity for a hearing to such unit of general purpose local government. A State may designate as a planning and service area under subsection (a)(1), any region within the State recognized for purposes of areawide planning which includes one or more such units of general purpose local government when the State determines that the designation of such a regional planning and service area is necessary for, and will enhance, the effective administration of the programs authorized by this subchapter. The State may include in any planning and service area designated under subsection (a)(1) such additional areas adjacent to the unit of general purpose local government or regions so designated as the State determines to be necessary for, and will enhance the effective administration of the programs authorized by this subchapter.

(2) The State is encouraged in carrying out the requirement of subsection (a)(1) to include the area covered by the appropriate economic development district involved in any planning and service area designated under subsection (a)(1), and to include all portions of an Indian reservation within a single planning and service area, if feasible.

(3) The chief executive officer of each State in which a planning and service area crosses State boundaries, or in which an

interstate Indian reservation is located, may apply to the Assistant Secretary to request redesignation as an interstate planning and service area comprising the entire metropolitan area or Indian reservation. If the Assistant Secretary approves such an application, the Assistant Secretary shall adjust the State allotments of the areas within the planning and service area in which the interstate planning and service area is established to reflect the number of older individuals within the area who will be served by an interstate planning and service area not within the State.

(4) Whenever a unit of general purpose local government, a region, a metropolitan area or an Indian reservation is denied designation under the provisions of subsection (a)(1), such unit of general purpose local government, region, metropolitan area, or Indian reservation may appeal the decision of the State agency to the Assistant Secretary. The Assistant Secretary shall afford such unit, region, metropolitan area, or Indian reservation an opportunity for a hearing. In carrying out the provisions of this paragraph, the Assistant Secretary may approve the decision of the State agency, disapprove the decision of the State agency and require the State agency to designate the unit, region, area, or Indian reservation appealing the decision as a planning and service area, or take such other action as the Assistant Secretary deems appropriate.

(5)

(A) A State which on or before October 1, 1980, had designated, with the approval of the Assistant Secretary, a single planning and service area covering all of the older individuals in the State, in which the State agency was administering the area plan, may after that date designate one or more additional planning and service areas within the State to be administered by public or private nonprofit agencies or organizations as area agencies on aging, after considering the factors specified in subsection (a)(1)(E). The State agency shall continue to perform the functions of an area agency on aging for any area of the State not included in a planning and service area for which an area agency on aging has been designated.

(B) Whenever a State agency designates a new area agency on aging after October 9, 1984, the State agency shall give the right to first refusal to a unit of general purpose local government if (i) such unit can meet the requirements of subsection (c), and (ii) the boundaries of such a unit and the boundaries of the area are reasonably contiguous.

(C)

(i) A State agency shall establish and follow appropriate procedures to provide due process to affected parties, if the State agency initiates an action or proceeding to—

(I) revoke the designation of the area agency on aging under subsection (a);

(II) designate an additional planning and service area in a State;

(III) divide the State into different planning and service areas; or

(IV) otherwise affect the boundaries of the planning and service areas in the State.

(ii) The procedures described in clause (i) shall include procedures for—

(I) providing notice of an action or proceeding described in clause (i);

(II) documenting the need for the action or proceeding;

(III) conducting a public hearing for the action or proceeding;

(IV) involving area agencies on aging, service providers, and older individuals in the action or proceeding; and

(V) allowing an appeal of the decision of the State agency in the action or proceeding to the Assistant Secretary.

(iii) An adversely affected party involved in an action or proceeding described in clause (i) may bring an appeal described in clause (ii)(V) on the basis of—

(I) the facts and merits of the matter that is the subject of the action or proceeding; or

(II) procedural grounds.

(iv) In deciding an appeal described in clause (ii)(V), the Assistant Secretary may affirm or set aside the decision of the State agency. If the Assistant Secretary sets aside the decision, and the State agency has taken an action described in subclauses (I) through (III) of

clause (i), the State agency shall nullify the action.

(c) ELIGIBLE STATE AREA AGENCIES; DEVELOPMENT OF AREA; PREFERRED AREA AGENCY ON AGING DESIGNEES An area agency on aging designated under subsection (a) shall be—

(1) an established office of aging which is operating within a planning and service area designated under subsection (a);

(2) any office or agency of a unit of general purpose local government, which is designated to function only for the purpose of serving as an area agency on aging by the chief elected official of such unit;

(3) any office or agency designated by the appropriate chief elected officials of any combination of units of general purpose local government to act only on behalf of such combination for such purpose;

(4) any public or nonprofit private agency in a planning and service area, or any separate organizational unit within such agency, which is under the supervision or direction for this purpose of the designated State agency and which can and will engage only in the planning or provision of a broad range of supportive services, or nutrition services within such planning and service area; or

(5) in the case of a State specified in subsection (b)(5), the State agency;

and shall provide assurance, determined adequate by the State agency, that the area agency on aging will have the ability to develop an area plan and to carry out, directly or through contractual or other arrangements, a program in

accordance with the plan within the planning and service area. In designating an area agency on aging within the planning and service area or within any unit of general purpose local government designated as a planning and service area the State shall give preference to an established office on aging, unless the State agency finds that no such office within the planning and service area will have the capacity to carry out the area plan.

(d) PUBLICATION FOR REVIEW AND COMMENT; CONTENTS The publication for review and comment required by paragraph (2)(C) of subsection (a) shall include—

(1) a descriptive statement of the formula's assumptions and goals, and the application of the definitions of greatest economic or social need,

(2) a numerical statement of the actual funding formula to be used,

(3) a listing of the population, economic, and social data to be used for each planning and service area in the State, and

(4) a demonstration of the allocation of funds, pursuant to the funding formula, to each planning and service area in the State.

42 U.S.C. § 3026(f) – Area Plans

(f) Withholding of area funds

(1)If the head of a State agency finds that an area agency on aging has failed to comply with Federal or State laws, including the area plan requirements of this section, regulations, or policies, the State may withhold a portion of the

funds to the area agency on aging available under this subchapter.

(2)

(A) The head of a State agency shall not make a final determination withholding funds under paragraph (1) without first affording the area agency on aging due process in accordance with procedures established by the State agency.

(B) At a minimum, such procedures shall include procedures for—

(i)providing notice of an action to withhold funds;

(ii)providing documentation of the need for such action; and

(iii)at the request of the area agency on aging, conducting a public hearing concerning the action.

(3)

(A)If a State agency withholds the funds, the State agency may use the funds withheld to directly administer programs under this subchapter in the planning and service area served by the area agency on aging for a period not to exceed 180 days, except as provided in subparagraph (B).

(B)If the State agency determines that the area agency on aging has not taken corrective action, or if the State agency does not approve the corrective action, during the 180-day period described in subparagraph (A), the State agency may extend the period for not more than 90 days.

42 U.S.C. § 3027 – State Plans

(a)CRITERIA FOR ELIGIBILITY; CONTENTS Except as provided in the succeeding sentence and section 3029(a) of this title, each State, in order to be eligible for grants from its allotment under this subchapter for any fiscal year, shall submit to the Assistant Secretary a State plan for a two-, three-, or four-year period determined by the State agency, with such annual revisions as are necessary, which meets such criteria as the Assistant Secretary may by regulation prescribe. If the Assistant Secretary determines, in the discretion of the Assistant Secretary, that a State failed in 2 successive years to comply with the requirements under this subchapter, then the State shall submit to the Assistant Secretary a State plan for a 1-year period that meets such criteria, for subsequent years until the Assistant Secretary determines that the State is in compliance with such requirements. Each such plan shall comply with all of the following requirements:

(1) The plan shall—

(A) require each area agency on aging designated under section 3025(a)(2)(A) of this title to develop and submit to the State agency for approval, in accordance with a uniform format developed by the State agency, an area plan meeting the requirements of section 3026 of this title; and

(B) be based on such area plans.

(2) The plan shall provide that the State agency will—

(A) evaluate, using uniform procedures described in section 3012(a)(26) of this title, the need for supportive services (including legal

assistance pursuant to subsection (a)(11), information and assistance, and transportation services), nutrition services, and multipurpose senior centers within the State;

(B) develop a standardized process to determine the extent to which public or private programs and resources (including volunteers and programs and services of voluntary organizations) that have the capacity and actually meet such need;

(C) specify a minimum proportion of the funds received by each area agency on aging in the State to carry out part B that will be expended (in the absence of a waiver under section 3026(c) or 3030c–3 of this title) by such area agency on aging to provide each of the categories of services specified in section 3026(a)(2) of this title.

(3) The plan shall—

(A) include (and may not be approved unless the Assistant Secretary approves) the statement and demonstration required by paragraphs (2) and (4) of section 3025(d) of this title (concerning intrastate distribution of funds); and

(B)with respect to services for older individuals residing in rural areas—

(i) provide assurances that the State agency will spend for each fiscal year, not less than the amount expended for such services for fiscal year 2000;

(ii) identify, for each fiscal year to which the plan applies, the projected costs of providing such services (including the cost of providing access to such services); and

(iii) describe the methods used to meet the needs for such services in the fiscal year preceding the first year to which such plan applies.

(4) The plan shall provide that the State agency will conduct periodic evaluations of, and public hearings on, activities and projects carried out in the State under this subchapter and subchapter XI, including evaluations of the effectiveness of services provided to individuals with greatest economic need, greatest social need, or disabilities (with particular attention to low-income minority older individuals, older individuals with limited English proficiency, and older individuals residing in rural areas).

(5) The plan shall provide that the State agency will—

(A) afford an opportunity for a hearing upon request, in accordance with published procedures, to any area agency on aging submitting a plan under this subchapter, to any provider of (or applicant to provide) services;

(B) issue guidelines applicable to grievance procedures required by section 3026(a)(10) of this title; and

(C) afford an opportunity for a public hearing, upon request, by any area agency on aging, by any provider of (or applicant to provide) services, or by any recipient of services under this subchapter regarding any waiver request, including those under section 3030c–3 of this title.

(6) The plan shall provide that the State agency will make such reports, in such form, and containing such information, as the Assistant Secretary may require, and comply with such requirements as the Assistant Secretary may impose to insure the correctness of such reports.

(7)

(A) The plan shall provide satisfactory assurance that such fiscal control and fund accounting procedures will be adopted as may be necessary to assure proper disbursement of, and accounting for, Federal funds paid under this subchapter to the State, including any such funds paid to the recipients of a grant or contract.

(B) The plan shall provide assurances that—

(i) no individual (appointed or otherwise) involved in the designation of the State agency or an area agency on aging, or in the designation of the head of any subdivision of the State agency or of an area agency on aging, is subject to a conflict of interest prohibited under this chapter;

(ii) no officer, employee, or other representative of the State agency or an area agency on aging is subject to a conflict of interest prohibited under this chapter; and

(iii) mechanisms are in place to identify and remove conflicts of interest prohibited under this chapter.

(8)

(A) The plan shall provide that no supportive services, nutrition services, or in-home services will be directly provided by the State agency or an area agency on aging in the State, unless, in the judgment of the State agency—

(i) provision of such services by the State agency or the area agency on aging is necessary to assure an adequate supply of such services;

(ii) such services are directly related to such State agency's or area agency on aging's administrative functions; or

(iii) such services can be provided more economically, and with comparable quality, by such State agency or area agency on aging.

(B) Regarding case management services, if the State agency or area agency on aging is already providing case management services (as of the date of submission of the plan) under a State program, the plan may specify that such agency is allowed to continue to provide case management services.

(C) The plan may specify that an area agency on aging is allowed to directly provide information and assistance services and outreach.

(9) The plan shall provide assurances that—

(A) the State agency will carry out, through the Office of the State Long-Term Care Ombudsman, a State Long-Term Care Ombudsman program in accordance with section 3058g of this title and this subchapter, and will expend for such purpose an amount that is not less than the amount expended by the State agency with funds received under this subchapter for fiscal year 2019, and an amount that is not less than the amount expended by the State agency with funds received under subchapter VII for fiscal year 2019; and

(B) funds made available to the State agency pursuant to section 3058g of this title shall be used to supplement and not supplant other Federal, State, and local funds expended to support activities described in section 3058g of this title.

(10) The plan shall provide assurances that the special needs of older individuals residing in rural areas will be taken into consideration and shall describe how those needs have been met and describe how funds have been allocated to meet those needs.

(11) The plan shall provide that with respect to legal assistance—

(A) the plan contains assurances that area agencies on aging will (i) enter into contracts with providers of legal assistance which can demonstrate the experience or capacity to deliver legal assistance; (ii) include in any such contract provisions to assure that any recipient of funds under division (i) will be subject to specific restrictions and regulations promulgated under the Legal Services Corporation Act [42 U.S.C. 2996 et seq.] (other than restrictions and regulations governing eligibility for legal assistance under such Act and governing membership of local governing boards) as determined appropriate by the Assistant Secretary; and (iii) attempt to involve the private bar in legal assistance activities authorized under this subchapter, including groups within the private bar furnishing services to older individuals on a pro bono and reduced fee basis;

(B) the plan contains assurances that no legal assistance will be furnished unless the grantee administers a program designed to provide legal assistance to older individuals with social or economic need and has agreed, if the grantee is not a Legal Services Corporation project grantee, to coordinate its services with existing Legal Services Corporation projects in the planning and service area in order to concentrate the use of funds provided under this subchapter on individuals with the greatest such need; and the area agency on aging makes a finding, after assessment, pursuant to standards for service promulgated by the Assistant Secretary, that any grantee selected is the entity best able to provide the particular services;

(C) the State agency will provide for the coordination of the furnishing of legal services to older individuals within the State, and provide advice and technical assistance in the provision of legal services to older individuals within the State and support the furnishing of training and technical assistance for legal services for older individuals;

(D) the plan contains assurances, to the extent practicable, that legal services furnished under the plan will be in addition to any legal services for older individuals being furnished with funds from sources other than this chapter and that reasonable efforts will be made to maintain existing levels of legal services for older individuals; and

(E) the plan contains assurances that area agencies on aging will give priority to legal assistance related to income, health care, long-term care, nutrition, housing, utilities, protective services, defense of guardianship, abuse, neglect, and age discrimination.

(12) The plan shall provide, whenever the State desires to provide for a fiscal year for services for the prevention of abuse of older individuals—

(A) the plan contains assurances that any area agency on aging carrying out such services will conduct a program consistent with relevant State law and coordinated with existing State adult protective service activities for—

(i) public education to identify and prevent abuse of older individuals;

(ii) receipt of reports of abuse of older individuals;

(iii) active participation of older individuals participating in programs under this chapter through outreach, conferences, and referral of such individuals to other social service agencies or

sources of assistance where appropriate and consented to by the parties to be referred; and

(iv) referral of complaints to law enforcement or public protective service agencies where appropriate;

(B) the State will not permit involuntary or coerced participation in the program of services described in this paragraph by alleged victims, abusers, or their households; and

(C) all information gathered in the course of receiving reports and making referrals shall remain confidential unless all parties to the complaint consent in writing to the release of such information, except that such information may be released to a law enforcement or public protective service agency.

(13) The plan shall provide assurances that each State will assign personnel (one of whom shall be known as a legal assistance developer) to provide State leadership in developing legal assistance programs for older individuals throughout the State.

(14) The plan shall, with respect to the fiscal year preceding the fiscal year for which such plan is prepared—

(A) identify the number of low-income minority older individuals in the State, including the number of low-income minority older individuals with limited English proficiency; and

(B) describe the methods used to satisfy the service needs of the low-income minority older individuals described in subparagraph (A), including the plan to meet the needs of low-income minority older individuals with limited English proficiency.

(15) The plan shall provide assurances that, if a substantial number of the older individuals residing

in any planning and service area in the State are of limited English-speaking ability, then the State will require the area agency on aging for each such planning and service area—

(A) to utilize, in the delivery of outreach services under section 3026(a)(2)(A) of this title, the services of workers who are fluent in the language spoken by a predominant number of such older individuals who are of limited English-speaking ability; and

(B) to designate an individual employed by the area agency on aging, or available to such area agency on aging on a full-time basis, whose responsibilities will include—

(i) taking such action as may be appropriate to assure that counseling assistance is made available to such older individuals who are of limited English-speaking ability in order to assist such older individuals in participating in programs and receiving assistance under this chapter; and

(ii) providing guidance to individuals engaged in the delivery of supportive services under the area plan involved to enable such individuals to be aware of cultural sensitivities and to take into account effectively linguistic and cultural differences.

(16) The plan shall provide assurances that the State agency will require outreach efforts that will—

(A) identify individuals eligible for assistance under this chapter, with special emphasis on—

(i) older individuals residing in rural areas;

(ii) older individuals with greatest economic need (with particular attention to low-income older individuals, including low-income minority older individuals, older individuals with limited English proficiency, and older individuals residing in rural areas);

(iii) older individuals with greatest social need (with particular attention to low-income older individuals, including low-income minority older individuals, older individuals with limited English proficiency, and older individuals residing in rural areas);

(iv) older individuals with severe disabilities;

(v) older individuals with limited English-speaking ability; and

(vi) older individuals with Alzheimer's disease and related disorders with neurological and organic brain dysfunction (and the caretakers of such individuals); and

(B) inform the older individuals referred to in clauses (i) through (vi) of subparagraph (A), and the caretakers of such individuals, of the availability of such assistance.

(17) The plan shall provide, with respect to the needs of older individuals with severe disabilities, assurances that the State will coordinate planning, identification, assessment of needs, and service for older individuals with disabilities with particular attention to individuals with severe disabilities with the State agencies with primary responsibility for individuals with disabilities, including severe disabilities, to enhance services and develop collaborative programs, where appropriate, to meet the needs of older individuals with disabilities.

(18) The plan shall provide assurances that area agencies on aging will conduct efforts to facilitate the coordination of community-based, long-term care services, pursuant to section 3026(a)(7) of this title, for older individuals who—

(A) reside at home and are at risk of institutionalization because of limitations on their ability to function independently;

(B) are patients in hospitals and are at risk of prolonged institutionalization; or

(C) are patients in long-term care facilities, but who can return to their homes if community-based services are provided to them.

(19) The plan shall include the assurances and description required by section 3058d(a) of this title.

(20) The plan shall provide assurances that special efforts will be made to provide technical assistance to minority providers of services.

(21) The plan shall—

(A) provide an assurance that the State agency will coordinate programs under this subchapter and programs under subchapter X, if applicable; and

(B) provide an assurance that the State agency will pursue activities to increase access by older individuals who are Native Americans to all aging programs and benefits provided by the agency, including programs and benefits provided under this subchapter, if applicable, and specify the ways in which the State agency intends to implement the activities.

(22) If case management services are offered to provide access to supportive services, the plan shall provide that the State agency shall ensure compliance with the requirements specified in section 3026(a)(8) of this title.

(23) The plan shall provide assurances that demonstrable efforts will be made—

(A) to coordinate services provided under this chapter with other State services that benefit older individuals; and

(B) to provide multigenerational activities, such as opportunities for older individuals to serve as mentors or advisers in child care, youth day care, educational assistance, at-risk youth intervention, juvenile delinquency treatment, and family support programs.

(24) The plan shall provide assurances that the State will coordinate public services within the State to assist older individuals to obtain transportation services associated with access to services provided under this subchapter, to services under subchapter X, to comprehensive counseling services, and to legal assistance.

(25) The plan shall include assurances that the State has in effect a mechanism to provide for quality in the provision of in-home services under this subchapter.

(26) The plan shall provide assurances that area agencies on aging will provide, to the extent feasible, for the furnishing of services under this chapter, consistent with self-directed care.

(27)

(A) The plan shall include, at the election of the State, an assessment of how prepared the State is, under the State's statewide service delivery model, for any anticipated change in the number of older individuals during the 10-year period following the fiscal year for which the plan is submitted.

(B) Such assessment may include—

(i) the projected change in the number of older individuals in the State;

(ii) an analysis of how such change may affect such individuals, including individuals with low incomes, individuals with greatest economic need, minority older individuals, older individuals residing in rural areas, and older individuals with limited English proficiency;

(iii) an analysis of how the programs, policies, and services provided by the State can be improved, including coordinating with area agencies on aging, and how resource levels can be adjusted to meet the needs of the changing population of older individuals in the State; and

(iv) an analysis of how the change in the number of individuals age 85 and older in the State is expected to affect the need for supportive services.

(28) The plan shall include information detailing how the State will coordinate activities, and develop long-range emergency preparedness plans, with area agencies on aging, local emergency response agencies, relief organizations, local governments, State agencies responsible for emergency preparedness, and any other institutions that have responsibility for disaster relief service delivery.

(29) The plan shall include information describing the involvement of the head of the State agency in the development, revision, and implementation of emergency preparedness plans, including the State Public Health Emergency Preparedness and Response Plan.

(30) The plan shall contain an assurance that the State shall prepare and submit to the Assistant Secretary annual reports that describe—

(A) data collected to determine the services that are needed by older individuals whose needs were the

focus of all centers funded under subchapter IV in fiscal year 2019;

(B) data collected to determine the effectiveness of the programs, policies, and services provided by area agencies on aging in assisting such individuals; and

(C) outreach efforts and other activities carried out to satisfy the assurances described in paragraphs (18) and (19) of section 3026(a) of this title.

(b) APPROVAL BY ASSISTANT SECRETARY; WAIVER OF REQUIREMENTS

(1) The Assistant Secretary shall approve any State plan which the Assistant Secretary finds fulfills the requirements of subsection (a), except the Assistant Secretary may not approve such plan unless the Assistant Secretary determines that the formula submitted under section 3025(a)(2)(D) of this title complies with the guidelines in effect under section 3025(a)(2)(C) of this title.

(2) The Assistant Secretary, in approving any State plan under this section, may waive the requirement described in paragraph (3)(B) of subsection (a) if the State agency demonstrates to the Assistant Secretary that the service needs of older individuals residing in rural areas in the State are being met, or that the number of older individuals residing in such rural areas is not sufficient to require the State agency to comply with such requirement.

(c) NOTICE AND HEARING PRIOR TO DISAPPROVAL

(1) The Assistant Secretary shall not make a final determination disapproving any State plan, or any modification thereof, or make a final determination that a State is ineligible under section 3025 of this title, without first affording the State reasonable notice and opportunity for a hearing.

(2) Not later than 30 days after such final determination, a State dissatisfied with such final determination may appeal such final determination to the Secretary for review. If the State timely appeals such final determination in accordance with subsection (e)(1), the Secretary shall dismiss the appeal filed under this paragraph.

(3) If the State is dissatisfied with the decision of the Secretary after review under paragraph (2), the State may appeal such decision not later than 30 days after such decision and in the manner described in subsection (e). For purposes of appellate review under the preceding sentence, a reference in subsection (e) to the Assistant Secretary shall be deemed to be a reference to the Secretary.

(d) DISCONTINUANCE OF PAYMENTS; DISBURSEMENT OF WITHHELD FUNDS TO AGENCIES WITH APPROVED PLANS; MATCHING FUNDS Whenever the Assistant Secretary, after reasonable notice and opportunity for a hearing to the State agency, finds that—

(1) the State is not eligible under section 3025 of this title,

(2) the State plan has been so changed that it no longer complies substantially with the provisions of subsection (a), or

(3) in the administration of the plan there is a failure to comply substantially with any such provision of subsection (a),

the Assistant Secretary shall notify such State agency that no further payments from its allotments under section 3024 of this title and section 3028 of this title will be made to the State (or, in the Assistant Secretary's discretion, that further payments to the State will be limited to projects under or portions of the State plan not affected by

such failure), until the Assistant Secretary is satisfied that there will no longer be any failure to comply. Until the Assistant Secretary is so satisfied, no further payments shall be made to such State from its allotments under section 3024 of this title and section 3028 of this title (or payments shall be limited to projects under or portions of the State plan not affected by such failure). The Assistant Secretary shall, in accordance with regulations the Assistant Secretary shall prescribe, disburse the funds so withheld directly to any public or nonprofit private organization or agency or political subdivision of such State submitting an approved plan in accordance with the provisions of this section. Any such payment shall be matched in the proportions specified in section 3024 of this title.

(e) APPEAL

(1) A State which is dissatisfied with a final action of the Assistant Secretary under subsection (b), (c), or (d) may appeal to the United States court of appeals for the circuit in which the State is located, by filing a petition with such court within 30 days after such final action. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Assistant Secretary, or any officer designated by the Assistant Secretary for such purpose. The Assistant Secretary thereupon shall file in the court the record of the proceedings on which the Assistant Secretary's action is based, as provided in section 2112 of title 28.

(2) Upon the filing of such petition, the court shall have jurisdiction to affirm the action of the Assistant Secretary or to set it aside, in whole or in part, temporarily or permanently, but until the filing of the record, the Assistant Secretary may modify or set

aside the Assistant Secretary's order. The findings of the Assistant Secretary as to the facts, if supported by substantial evidence, shall be conclusive, but the court, for good cause shown, may remand the case to the Assistant Secretary to take further evidence, and the Assistant Secretary shall, within 30 days, file in the court the record of those further proceedings. Such new or modified findings of fact shall likewise be conclusive if supported by substantial evidence. The judgment of the court affirming or setting aside, in whole or in part, any action of the Assistant Secretary shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.

(3) The commencement of proceedings under this subsection shall not, unless so specifically ordered by the court, operate as a stay of the Assistant Secretary's action.

(f) CONFIDENTIALITY OF INFORMATION RELATING TO LEGAL ASSISTANCE

Neither a State, nor a State agency, may require any provider of legal assistance under this subchapter to reveal any information that is protected by the attorney-client privilege.

42 U.S.C. § 1983 – Civil Action for Deprivation of Rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or

immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

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§ 1321.7 Mission of the State agency.

(a) The Older Americans Act intends that the State agency on aging shall be the leader relative to all aging issues on behalf of all older persons in the State. This means that the State agency shall proactively carry out a wide range of functions related to advocacy, planning, coordination, interagency linkages, information sharing, brokering, monitoring and evaluation, designed to lead to the development or enhancement of comprehensive and coordinated community based systems in, or serving, communities throughout the State. These systems shall be designed to assist older persons in leading independent, meaningful and dignified lives in their own homes and communities as long as possible.

(b) The State agency shall designate area agencies on aging for the purpose of carrying out the mission described above for the State agency at the sub-State

level. The State agency shall designate as its area agencies on aging only those sub-state agencies having the capacity and making the commitment to fully carry out the mission described for area agencies in § 1321.53 below.

(c) The State agency shall assure that the resources made available to area agencies on aging under the Older Americans Act are used to carry out the mission described for area agencies in § 1321.53 below.

§ 1321.9 Organization and staffing of the State agency.

(a) The State shall designate a sole State agency to develop and administer the State plan required under this part and serve as the effective visible advocate for the elderly within the State.

(b) The State agency shall have an adequate number of qualified staff to carry out the functions prescribed in this part.

(c) The State agency shall have within the State agency, or shall contract or otherwise arrange with another agency or organization, as permitted by section 307(a)(12)(A), an Office of the State Long-Term Care Ombudsman, with a full-time State ombudsman and such other staff as are appropriate.

(d) If a State statute establishes a State ombudsman program which will perform the functions of section 307(a)(12) of the Act, the State agency continues to be responsible to assure that all of the requirements of the Act for this program are met regardless of

the State legislation or source of funds. In such cases, the Governor shall confirm this through an assurance in the State plan.

§ 1321.11 State agency policies.

(a) The State agency on aging shall develop policies governing all aspects of programs operated under this part, including the ombudsman program whether operated directly by the State agency or under contract. These policies shall be developed in consultation with other appropriate parties in the State. The State agency is responsible for enforcement of these policies.

(b) The policies developed by the State agency shall address the manner in which the State agency will monitor the performance of all programs and activities initiated under this part for quality and effectiveness. The State Long-Term Care Ombudsman shall be responsible for monitoring the files, records and other information maintained by the Ombudsman program. Such monitoring may be conducted by a designee of the Ombudsman. Neither the Ombudsman nor a designee shall disclose identifying information of any complainant or long-term care facility resident to individuals outside of the Ombudsman program, except as otherwise specifically provided in § 1324.11(e)(3) of this chapter.

§ 1321.13 Advocacy responsibilities.

(a) The State agency shall:

(1) Review, monitor, evaluate and comment on Federal, State and local plans, budgets,

regulations, programs, laws, levies, hearings, policies, and actions which affect or may affect older individuals and recommend any changes in these which the State agency considers to be appropriate;

(2) Provide technical assistance to agencies, organizations, associations, or individuals representing older persons; and

(3) Review and comment, upon request, on applications to State and Federal agencies for assistance relating to meeting the needs of older persons.

(b) No requirement in this section shall be deemed to supersede a prohibition contained in a Federal appropriation on the use of Federal funds to lobby the Congress.

§ 1321.15 Duration, format and effective date of the State plan.

(a) A State may use its own judgment as to the format to use for the plan, how to collect information for the plan, and whether the plan will remain in effect for two, three or four years.

(b) An approved State plan or amendment, as indentified in § 1321.17, becomes effective on the date designated by the Commissioner.

(c) A State agency may not make expenditures under a new plan or amendment requiring approval, as identified in § 1321.17 and § 1321.19, until it is approved.

§ 1321.17 Content of State plan.

To receive a grant under this part, a State shall have an approved State plan as prescribed in section 307 of the Act. In addition to meeting the requirements of section 307, a State plan shall include:

(a) Identification by the State of the sole State agency that has been designated to develop and administer the plan.

(b) Statewide program objectives to implement the requirements under Title III of the Act and any objectives established by the Commissioner through the rulemaking process.

(c) A resource allocation plan indicating the proposed use of all title III funds administered by a State agency, and the distribution of title III funds to each planning and service area.

(d) Identification of the geographic boundaries of each planning and service area and of area agencies on aging designated for each planning and service area, if appropriate.

(e) Provision of prior Federal fiscal year information related to low income minority and rural older individuals as required by sections 307(a)(23) and (29) of the Act.

(f) Each of the assurances and provisions required in sections 305 and 307 of the Act, and provisions that the State meets each of the requirements under §§ 1321.5 through 1321.75 of this part, and the following assurances as prescribed by the Commissioner:

(1) Each area agency engages only in activities which are consistent with its statutory mission as

prescribed in the Act and as specified in State policies under § 1321.11;

(2) Preference is given to older persons in greatest social or economic need in the provision of services under the plan;

(3) Procedures exist to ensure that all services under this part are provided without use of any means tests;

(4) All services provided under title III meet any existing State and local licensing, health and safety requirements for the provision of those services;

(5) Older persons are provided opportunities to voluntarily contribute to the cost of services;

(6) Area plans shall specify as submitted, or be amended annually to include, details of the amount of funds expended for each priority service during the past fiscal year;

(7) The State agency on aging shall develop policies governing all aspects of programs operated under this part, including the manner in which the ombudsman program operates at the State level and the relation of the ombudsman program to area agencies where area agencies have been designated;

(8) The State agency will require area agencies on aging to arrange for outreach at the community level that identifies individuals eligible for assistance under this Act and other programs, both public and private, and informs them of the availability of assistance. The outreach efforts shall place special emphasis on reaching older individuals with the greatest economic or social needs with particular attention to low income minority individuals, including outreach to

identify older Indians in the planning and service area and inform such older Indians of the availability of assistance under the Act.

(9) The State agency shall have and employ appropriate procedures for data collection from area agencies on aging to permit the State to compile and transmit to the Commissioner accurate and timely statewide data requested by the Commissioner in such form as the Commissioner directs; and

(10) If the State agency proposes to use funds received under section 303(f) of the Act for services other than those for preventive health specified in section 361, the State plan shall demonstrate the unmet need for the services and explain how the services are appropriate to improve the quality of life of older individuals, particularly those with the greatest economic or social need, with special attention to low-income minorities.

(11) Area agencies shall compile available information, with necessary supplementation, on courses of post-secondary education offered to older individuals with little or no tuition. The assurance shall include a commitment by the area agencies to make a summary of the information available to older individuals at multipurpose senior centers, congregate nutrition sites, and in other appropriate places.

(12) Individuals with disabilities who reside in a non-institutional household with and accompany a person eligible for congregate meals under this part shall be provided a meal on the same basis that meals are provided to volunteers pursuant to section 307(a)(13)(I) of the Act.

(13) The services provided under this part will be coordinated, where appropriate, with the services provided under title VI of the Act.

(14)

(i) The State agency will not fund program development and coordinated activities as a cost of supportive services for the administration of area plans until it has first spent 10 percent of the total of its combined allotments under Title III on the administration of area plans;

(ii) State and area agencies on aging will, consistent with budgeting cycles (annually, biannually, or otherwise), submit the details of proposals to pay for program development and coordination as a cost of supportive services, to the general public for review and comment; and

(iii) The State agency certifies that any such expenditure by an area agency will have a direct and positive impact on the enhancement of services for older persons in the planning and service area.

(15) The State agency will assure that where there is a significant population of older Indians in any planning and service area that the area agency will provide for outreach as required by section 306(a)(6)(N) of the Act.

§ 1321.19 Amendments to the State plan.

(a) A State shall amend the State plan whenever necessary to reflect:

(1) New or revised Federal statutes or regulations,

(2) A material change in any law, organization, policy or State agency operation, or

(3) Information required annually by sections 307(a) (23) and (29) of the Act.

(b) Information required by paragraph (a)(3) of this section shall be submitted according to guidelines prescribed by the Commissioner.

(c) If a State intends to amend provisions of its plan required under §§ 1321.17(a) or (f), it shall submit its proposed amendment to the Commissioner for approval. If the State changes any of the provisions of its plan required under § 1321.17 (b) through (d), it shall amend the plan and notify the Commissioner. A State need only submit the amended portions of the plan.

§ 1321.21 Submission of the State plan or plan amendment to the Commissioner for approval.

Each State plan, or plan amendment which requires approval of the Commissioner, shall be signed by the Governor or the Governor's designee and submitted to the Commissioner to be considered for approval at least 45 calendar days before the proposed effective date of the plan or plan amendment.

§ 1321.23 Notification of State plan or State plan amendment approval.

(a) The Commissioner approves a State plan or State plan amendment by notifying the Governor or the Governor's designee in writing.

(b) When the Commissioner proposes to disapprove a State plan or amendment, the Commissioner notifies the Governor in writing, giving the reasons for the proposed disapproval, and informs

the State agency that it has 60 days to request a hearing on the proposed disapproval following the procedures specified in subpart E of this part.

§ 1321.25 Restriction of delegation of authority to other agencies.

A State or area agency may not delegate to another agency the authority to award or administer funds under this part.

§ 1321.27 Public participation.

The State agency shall have a mechanism to obtain and shall consider the views of older persons and the public in developing and administering the State plan.

§ 1321.29 Designation of planning and service areas.

(a) Any unit of general purpose local government, region within a State recognized for area wide planning, metropolitan area, or Indian reservation may make application to the State agency to be designated as a planning and service area, in accordance with State agency procedures.

(b) A State agency shall approve or disapprove any application submitted under paragraph (a) of this section.

(c) Any applicant under paragraph (a) of this section whose application for designation as a planning and service area is denied by a State agency may appeal the denial to the State agency, under procedures specified by the State agency.

(d) If the State denies an applicant for designation as a planning and service area under paragraph (a) of this section, the State shall provide a hearing on the denial of the application, if requested by the applicant, as well as issue a written decision.

§ 1321.31 Appeal to Commissioner.

This section sets forth the procedures the Commissioner follows for providing hearings to applicants for designation as a planning and service area, under § 1321.29(a), whose application is denied by the State agency.

(a) Any applicant for designation as a planning and service area under § 1321.29(a) whose application is denied, and who has been provided a hearing and a written decision by the State agency, may appeal the denial to the Commissioner in writing within 30 days following receipt of a State's hearing decision.

(b) The Commissioner, or the Commissioner's designee, holds a hearing, and issues a written decision, within 60 days following receipt of an applicant's written request to appeal the State agency hearing decision to deny the applicant's request under § 1321.29(a).

(c) When the Commissioner receives an appeal, the Commissioner requests the State Agency to submit:

(1) A copy of the applicant's application for designation as a planning and service area;

(2) A copy of the written decision of the State; and

(3) Any other relevant information the Commissioner may require.

(d) The procedures for the appeal consist of:

(1) Prior written notice to the applicant and the State agency of the date, time and location of the hearing;

(2) The required attendance of the head of the State agency or designated representatives;

(3) An opportunity for the applicant to be represented by counsel or other representative; and

(4) An opportunity for the applicant to be heard in person and to present documentary evidence.

(e) The Commissioner may:

(1) Deny the appeal and uphold the decision of a State agency;

(2) Uphold the appeal and require a State agency to designate the applicant as a planning and service area; or

(3) Take other appropriate action, including negotiating between the parties or remanding the appeal to the State agency after initial findings.

(f) The Commissioner will uphold the decision of the State agency if it followed the procedures specified in § 1321.29, and the hearing decision is not manifestly inconsistent with the purpose of this part.

(g) The Commissioner's decision to uphold the decision of a State agency does not extend beyond the period of the approved State plan.

§ 1321.33 Designation of area agencies.

An area agency may be any of the types of agencies under section 305(c) of the Act. A State may not designate any regional or local office of the State as an area agency. However, when a new area agency on aging is designated, the State shall give right of

first refusal to a unit of general purpose local government as required in section 305(b)(5)(B) of the Act. If the unit of general purpose local government chooses not to exercise this right, the State shall then give preference to an established office on aging as required in section 305(c)(5) of the Act.

§ 1321.35 Withdrawal of area agency designation.

(a) In carrying out section 305 of the Act, the State agency shall withdraw the area agency designation whenever it, after reasonable notice and opportunity for a hearing, finds that:

(1) An area agency does not meet the requirements of this part;

(2) An area plan or plan amendment is not approved;

(3) There is substantial failure in the provisions or administration of an approved area plan to comply with any provision of the Act or of this part or policies and procedures established and published by the State agency on aging; or

(4) Activities of the area agency are inconsistent with the statutory mission prescribed in the Act or in conflict with the requirement of the Act that it function only as an area agency on aging.

(b) If a State agency withdraws an area agency's designation under paragraph (a) of this section it shall:

(1) Provide a plan for the continuity of area agency functions and services in the affected planning and service area; and

(2) Designate a new area agency in the planning and service area in a timely manner.

(c) If necessary to ensure continuity of services in a planning and service area, the State agency may, for a period of up to 180 days after its final decision to withdraw designation of an area agency:

(1) Perform the responsibilities of the area agency; or

(2) Assign the responsibilities of the area agency to another agency in the planning and service area.

(d) The Commissioner may extend the 180-day period if a State agency:

(1) Notifies the Commissioner in writing of its action under paragraph (c) of this section;

(2) Requests an extension; and

(3) Demonstrates to the satisfaction of the Commissioner a need for the extension.

§ 1321.37 Intrastate funding formula.

(a) The State agency, after consultation with all area agencies in the State, shall develop and use an intrastate funding formula for the allocation of funds to area agencies under this part. The State agency shall publish the formula for review and comment by older persons, other appropriate agencies and organizations and the general public. The formula shall reflect the proportion among the planning and service areas of persons age 60 and over in greatest economic or social need with particular attention to low-income minority individuals. The State agency shall review and update its formula as often as a new State plan is submitted for approval.

(b) The intrastate funding formula shall provide for a separate allocation of funds received under section 303(f) for preventive health services. In the award of such funds to selected planning and service areas, the State agency shall give priority to areas of the State:

(1) Which are medically underserved; and

(2) In which there are large numbers of individuals who have the greatest economic and social need for such services.

(c) The State agency shall submit its intrastate formula to the Commissioner for review and comment. The intrastate formula shall be submitted separately from the State plan.

§ 1321.41 Single State planning and service area.

(a) The Commissioner will approve the application of a State which was, on or before October 1, 1980, a single planning and service area, to continue as a single planning and service area if the State agency demonstrates that:

(1) The State is not already divided for purposes of planning and administering human services; or

(2) The State is so small or rural that the purposes of this part would be impeded if the State were divided into planning and services areas; and

(3) The State agency has the capacity to carry out the responsibilities of an area agency, as specified in the Act.

(b) Prior to the Commissioner's approval for a State to continue as a single planning and service

area, all the requirements and procedures in § 1321.29 shall be met.

(c) If the Commissioner approves a State's application under paragraph (a) this section:

(1) The Commissioner notifies the State agency to develop a single State planning and service area plan which meets the requirements of section 306 and 307 of the Act.

(2) A State agency shall meet all the State and area agency function requirements specified in the Act.

(d) If the Commissioner denies the application because a State fails to meet the criteria or requirements set forth in paragraphs (a) or (b) of this section, the Commissioner notifies the State that it shall follow procedures in section 305(A)(1)(E) of the Act to divide the State into planning and service areas.

§ 1321.43 Interstate planning and service area.

(a) Before requesting permission of the Commissioner to designate an interstate planning and service area, the Governor of each State shall execute a written agreement that specifies the State agency proposed to have lead responsibility for administering the programs within the interstate planning and service area and lists the conditions, agreed upon by each State, governing the administration of the interstate planning and service area.

(b) The lead State shall request permission of the Commissioner to designate an interstate planning and service area.

(c) The lead State shall submit the request together with a copy of the agreement as part of its State plan or as an amendment to its State plan.

(d) Prior to the Commissioner's approval for States to designate an interstate planning and service area, the Commissioner shall determine that all applicable requirements and procedures in § 1321.29 and § 1321.33 of this part, shall be met.

(e) If the request is approved, the Commissioner, based on the agreement between the States, increases the allotment of the State with lead responsibility for administering the programs within the interstate area and reduces the allotment(s) of the State(s) without lead responsibility by one of these methods:

(1) Reallotment of funds in proportion to the number of individuals age 60 and over for that portion of the interstate planning and service area located in the State without lead responsibility; or

(2) Reallotment of funds based on the intrastate funding formula of the State(s) without lead responsibility.

§ 1321.45 Transfer between congregate and home-delivered nutrition service allotments.

(a) A State agency, without the approval of the Commissioner, may transfer between allotments up to 30 percent of a State's separate allotments for congregate and home-delivered nutrition services.

(b) A State agency may apply to the Commissioner to transfer from one allotment to the other a portion exceeding 30 percent of a State's separate allotments for congregate and home-delivered nutrition services.

A State agency desiring such a transfer of allotment shall:

(1) Specify the percent which it proposes to transfer from one allotment to the other;

(2) Specify whether the proposed transfer is for the entire period of a State plan or a protion of a plan period; and

(3) Specify the purpose of the proposed transfer.

§ 1321.47 Statewide non-Federal share requirements.

The statewide non-Federal share for State or area plan administration shall not be less than 25 percent of the funds usesd under this part. All services statewide, including ombudsman services and services funded under Title III-B, C, D, E and F, shall be funded on a statewide basis with a non-Federal share of not less than 15 percent. Matching requirements for individual area agencies are determined by the State agency.

§ 1321.49 State agency maintenance of effort.

In order to avoid a penalty, each fiscal year the State agency, to meet the required non-federal share applicable to its allotments under this part, shall spend under the State plan for both services and administration at least the average amount of State funds it spent under the plan for the three previous fiscal years. If the State agency spends less than this amount, the Commissioner reduces the State's allotments for supportive and nutrition services under this part by a percentage equal to the percentage by which the State reduced its expenditures.

§ 1321.51 Confidentiality and disclosure of information.

(a) A State agency shall have procedures to protect the confidentiality of information about older persons collected in the conduct of its responsibilities. The procedures shall ensure that no information about an order person, or obtained from an older person by a service provider or the State or area agencies, is disclosed by the provider or agency in a form that identifies the person without the informed consent of the person or of his or her legal representative, unless the disclosure is required by court order, or for program monitoring by authorized Federal, State, or local monitoring agencies.

(b) A State agency is not required to disclose those types of information or documents that are exempt from disclosure by a Federal agency under the Federal Freedom of Information Act, 5 U.S.C. 552.

(c) A State or area agency on aging may not require a provider of legal assistance under this part to reveal any information that is protected by attorney client privilege.

§ 1321.52 Evaluation of unmet need.

Each State shall submit objectively collected and statistically valid data with evaluative conclusions concerning the unmet need for supportive services, nutrition services, and multipurpose senior centers gathered pursuant to section 307(a)(3)(A) of the Act to the Commissioner. The evaluations for each State shall consider all services in these categories regardless of the source of

funding for the services. This information shall be submitted not later than June 30, 1989 and shall conform to guidance issued by the Commissioner.

§ 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.