

Follow-Up Questions and Answers from the NCEA and NAPSA Webcast¹:

The Elder Justice Act: What It Says, What It Means, And When Will It Be Implemented?

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Presenters: Bill Benson and Bob Blancato

Will the slides be sent out to participants?

The slides and a copy of the Elder Justice Act will be posted on the NCEA and NAPSA websites along with a link to the entire archived webcast which is available to view/listen to.

Questions Regarding Reporting of Crimes in Long-Term Care Facilities:

Will the nursing home surveyor complaint system report crimes directly to district attorneys?

What law enforcement agencies are crimes in long term care facilities to be reported to?

What types of crimes are included? White collar crimes such as falsifying Medicare/aid reimbursement documents?

How does the crime reporting requirement affect mandatory reporting?

Following are the EJA provisions for federally funded long-term care facilities to report crimes to law enforcement:

- a. The duty to report falls on “covered individuals,” defined as: “each individual who is an owner, operator, employee, manager, agent, or contractor of a long-term care facility” which [received more than \$10,000 in federal funds the previous year] (bold added);
- b. Crimes, as defined in the facility’s local jurisdiction, against residents or persons receiving care are to be reported to the local law enforcement agency(ies) in the facility’s locale [“Each covered individual shall report to the Secretary and 1 or more law enforcement entities for the political subdivision in which the facility is located any reasonable suspicion of a crime (as defined by the law of the applicable political subdivision) against any individual who is a resident of, or is receiving care from, the facility.”] (bold added);

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- c. The reporting requirement is limited to crimes against residents and clients of the facility; therefore, fraudulent billings and the like are not covered.
- d. This requirement does not affect mandatory reporting. If a “covered individual” is also a mandated reporter in his or her state, then the individual must report to law enforcement and to APS, the state regulatory agency, or whatever agency is established in their state’s statutes.

Will the minimum CMP (civil money penalty) be \$200,000 for failure to report? Or will the amount be up to the discretion of CMS (Centers for Medicare & Medicaid Services in HHS)?

The \$200,000 and \$300,000 levels established in the act are maximum amounts a long-term care facility owner or operator may be fined for failing to report a crime against a resident occurring in their facility.

Where will the CPMs go, and what will they be used for?

The CPM fines will be administered by the Department of Health and Human Services (DHHS). To date there is no information available on how they may be used.

Is there anything in the EJA to require minimum staffing levels in facilities?

No; there is no requirement for minimum staffing levels, but there are incentives to retain staff and to improve facility management.

Will any of the career ladder, etc. opportunities extend to care providers working in home and community-based services?

This is not clear from the statutory language. The EJA defines “long term care” broadly. It does not specify that it is limited to persons residing in, or care provided in, facilities: “The term ‘long-term care’ means supportive and health services specified by the Secretary for individuals who need assistance because the individuals have a loss of capacity for self-care due to illness, disability, or vulnerability.” This is an example of statutory language which will have to be further defined by DHSS.

Is there any possibility that a national nurse aide registry could also include those persons who work in the home care arena? Consumers of home and community-based services are also exposed to these risks. Persons working in these roles move throughout the care venues.

The section of the law regarding a national nurse aide registry states that the definition of nurse aide is the same one used in a section of the Social Security Act concerning long term care facilities, but is amended to say “such term includes an individual who provides such services through an agency or under a contract with the facility.” It is ultimately up to the DHSS to determine the extent of the reach of the nurse aide registry.

Please speak about the intersection of EJA and the new territory of home and community-based long-term care opened up by the CLASS Act. It sounds like the Nurse Aide Registry is a natural link... what else?

There are no direct links between the EJA and the CLASS Act. Again, it will be up to DHHS to determine the coordination of provisions in these and other authorizing statutes.

What is the effective date of the bill?

The bill was effective the date the President signed it into law on March 23, 2010. However, most of it cannot be implemented until funds are appropriated.

How likely is it that AoA will be the federal home for APS?

At this juncture it appears likely, and AoA is already involved in the creation of the new Elder Abuse Advisory Board. Ultimately, it is up to the Secretary of DHHS to make this determination.

Is there any inkling as to whether there would be a required state/local match to draw down any federal APS funds? Is so, any inkling as to the percent of the match?

The law itself does not establish any match requirements. However, it is not uncommon that federal funds distributed to states require some sort of matching funds. It will be up to DHHS to determine if a match will be required.

Do we know when the EJA will be funded?

Funding of the Elder Justice Act provisions is decided by Congress, with recommendations and approval by the President. Funding bills must go through the appropriations processes in both houses of Congress, and then the appropriation bill has to be signed by the President. There is no way to predict when this will happen, although Bob Blancato stated there are efforts underway to have funding included in the 2011 and 2012 federal DHHS appropriation bills. For more information, contact either Bob Blancato or Bill Benson.

Why were funds appropriated for "Research" and not for the Advisory Board (and what if anything can we do to assist)?

No funds have been appropriated for any purpose under the Elder Justice Act, although funds were appropriated for the Affordable Care Act, of which the Elder Justice Act is a part. It is possible the Advisory Board could be funded from monies appropriated for HHS to administer the Affordable Care Act, but it is up to Congress and the President to decide if and when to appropriate funds for the provisions of the EJA. For more information and questions on appropriations, you may contact either Bob Blancato or Bill Benson.

Has there been a determination as to how the APS funds could be spent (direct services, caseworker FTE, training, data system, etc.)? And has the NAPSA survey conducted on the state needs been completed? If not, when is that expected to be finished and distributed?

The EJA does not specify which aspects of adult protective services can be funded with EJA appropriations, but such specifics could be part of federal guidance and/or regulations if developed. If DHHS decides to promulgate regulations, there is always a public comment period on the proposed regulations.

The preliminary results of NAPSA's APS Administrator survey conducted last summer were presented at the NAPSA Conference in San Diego in early November. When the results are finalized, NAPSA will distribute them to APS administrators and others.

What kinds of data do you need states APS's to collect that would best support your efforts to promote APS through Elder Justice Act? About \$100 million was authorized for APS; while this sounds like a huge sum--and certainly is compared to nothing--every cent will be needed and more.

How can we ensure that this is funded at the 100 percent level so that those providing direct service have the resources needed to meet higher expectations as the evaluative component demands?

Because the webcast was conducted with federal funds, we cannot respond to questions regarding legislative advocacy for a specific piece of legislation, including funding legislation. However, it is important that decision-makers are educated about the importance of APS programs and services, and of the other provisions in the EJA. Data that demonstrate the effectiveness of program efforts; the scope and magnitude of the problem of elder abuse, neglect, and exploitation; and the positive impacts of programs and services for clients would be very helpful in enhancing understanding about the importance of the EJA and other elder abuse prevention and intervention programs and services.

What is the status of the Elder Abuse Victims Act?

The Elder Abuse Victims Act of 2009, which includes the justice system provisions originally included in the Elder Justice Act when it was first introduced in 2002, passed the House and is currently in the Senate Judiciary Committee. If it does not pass in the Senate in the current lame duck session, it will have to be re-introduced as a new bill in the new Congress in 2011, which means it will start over at the beginning of the process. FYI, the bill's originator, Rep. Joe Sestak of Pennsylvania, will no longer be a member of Congress in 2011.

Is there flexibility in the law for serving persons who are disabled and under the age of 60 in the new APS formula funding? (the supplementing but not supplanting funding)

The EJA states: "Funds made available pursuant to this subsection may only be used by States and local units of government to provide adult protective services and may not be used for any other purpose." Adult protective services are defined in the act as "such services provided to adults as the Secretary may specify...." Additionally, Section 2042 contains language pertaining specifically to adult protective services for elders.

NAPSA has interpreted these sections to mean that any of the formula grant monies appropriated for state APS programs may be used for APS services for any clients eligible under that state and program's law and regulations. However, this decision will ultimately be made by DHSS.

Are there any provisions dealing with reduced capacity and oversight of guardians or alternatives to guardianship?

There are no provisions relating to guardianship in the EJA, except a reference to recommendations regarding guardianship services being included in a report to Congress from the Elder Abuse Advisory Committee.

Are there provisions for legal services for elder abuse victims in the EJA?

The EJA as passed does not include provisions for funding legal services.

Lori Stiegel of the ABA Commission on Law and Aging provided additional information regarding legal services funding in the EJA below:

The original version of the EJA introduced in 2002 did authorize funding for legal services, but that provision—along with the other justice-related provisions—were split off from the original and were not enacted as part of the EJA. Many of the justice-related provisions have passed the House and are pending before the Senate in the Elder Abuse Victims Act (EAVA) – HR 448 and S 1821 – but the specific language related to funding for legal services is not in those bills. They do, however, contain some relevant provisions:

- 1) Section 101 requires the Attorney General, in consultation with the Secretary of the Department of Health & Human Services to develop a plan for elder justice programs and activities relating to, among other things, intervention for victims and improvement of the elder justice system. Both of those could be interpreted to relate to the delivery of legal services to victims.
- 2) Section 102 authorizes grant programs to study and meet the needs of elder abuse victims and could also be interpreted to relate to legal services.
- 3) In Section 201 establishing “Elder Serve Victim Grant Programs,” subsection (e) requires the provision of emergency legal advocacy to victims or, if appropriate, their family members.”