JUSTICE IN AGING

FIGHTING SENIOR POVERTY THROUGH LAW

Justice in Aging Comment for the Record

November 14, 2019 Hearing on Caring for Aging Americans

Ways and Means Committee of the U.S. House of Representatives

Submitted November 21, 2019

Justice in Aging appreciates the opportunity to provide written comments to the Ways and Means Committee to be considered as part of the record for the November 14, 2019, Hearing on Caring for Aging Americans. Justice in Aging is an advocacy organization with the mission of improving the lives of low-income older adults. We use the power of law to fight senior poverty by securing access to affordable health care, economic security and the courts for older adults with limited resources, and center our advocacy on addressing the needs people who have been marginalized and excluded from justice, such as women, people of color, LGBTQ individuals, and people with limited English proficiency. Our testimony is informed by our decades of experience with Medicare, Medicaid, and the Supplemental Security Income (SSI) program.

America's population is rapidly aging. By 2030, 1 in 5 Americans will be over the age of 65.[1] Distressingly, many older adults are aging in poverty. Today, 14 percent of older adults age 65 and over – 7.2 million individuals – are living in poverty, and the rates are increasing. [2] Older adults represent the only demographic that has experienced an increase in poverty in recent years.[3] Older women, populations of color, and LGBTQ seniors are especially at risk for aging in poverty due to intersecting and compounding systemic drivers of poverty over their lifetime. For example, women are 80 percent more likely to be impoverished in retirement compared to men[4] with older women of color experiencing poverty at rates two times higher than older white women.[5]

To ensure that all Americans can age in dignity regardless of sex, race, gender identity, sexual orientation, or immigration status, policy solutions must be centered on equity and address the fact that not all individuals age in the same way or have access to the same resources. Our

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[1] United States Census Bureau, "Older People Projected to Outnumber Children for First Time in U.S. History," (Mar. 2018), available at https://www.census.gov/newsroom/press-releases/2018/cb18-41-population-projections.html.

[2] Cubanski, J., Koma, W., Damico, A., & Neuman, T., Kaiser Family Foundation, How Many Seniors Live in Poverty (Nov. 2018), available at files.kff.org/attachment/Issue-Brief-How-Many-Seniors-Live-in-Poverty.

[3] US Census Bureau, "Outlying Older Americans: The Puzzle of Increasing Poverty among those 65 and Older," (Sep. 2017), available at https://www.census.gov/newsroom/blogs/random-samplings/2017/09/outlying_older_ameri.html

[4] Jennifer Brown, et al., "Shortchanged in Retirement Continuing Challenges to Women's Financial Future," *National Institute on Retirement Security*, March 2016, retrieved August 28, 2019, https://www.nirsonline.org/wp-content/uploads/2017/06/final_shortchanged_retirement_report_2016.pdf

[5] Cubanski, J., Koma, W., Damico, A., & Neuman, T., Kaiser Family Foundation, How Many Seniors Live in Poverty (Nov. 2018), available at http://files.kff.org/attachment/Issue-Brief-How-Many-Seniors-Live-in-Poverty.

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comments and recommendations below focus on three key areas impacting low-income older adults: access to home and community-based services and caregiving, economic security, and elder justice.

I. Access to Home and Community Based Services & Caregiving

Most of us want to age at home and in our communities, with our families and friends. Unfortunately, most of us cannot afford to this if we have significant health conditions or need help with activities of daily living or other tasks such as transportation, shopping, cooking, and taking care of our home. A major barrier to accessing affordable assistance at home is that health insurance does not cover Home and Community Based Services (HCBS). Medicare does not cover long-term services and supports, including HCBS, and most Medicaid-funded HCBS is only available to those with very limited incomes and resources who meet nursing facility level of care. Plus, states can cap enrollment in Medicaid HCBS programs because HCBS, unlike nursing facility care, is optional. As a result, older adults and their families must pay for or provide these services themselves or go without the help they need and place themselves at risk of being hospitalized or institutionalized.

The fact that there is no health insurance coverage for HCBS or comprehensive paid family leave also means that most family caregivers are not only uncompensated for the care they are providing, they are also forced to forgo other paid work opportunities. Unpaid caregiving has dire intergenerational economic implications for caregivers and their families – particularly for women and most notably for women of color. As of 2015, approximately 67% of caregivers for older adults in this country were female. Women of color are more likely to act as a caregiver for adults with 21% of Hispanic women and 20% of Black women reporting that they act as a caregiver versus 17% of white women.[6] Acting as an unpaid caregiver is a primary factor contributing to the high rates of women who age into poverty. Because women continue to act as primary caregivers for both children and older adults, they take significant time out of the paid workforce, lowering their ability to make ends meet in the short-term and to save for retirement.[7]

We are also facing a paid caregiver shortage. Between 2016 and 2026, 7.8 million direct care job openings will need to be filled both for services provided in the home and community as well as in nursing facilities.[8]

[6] AARP Public Policy Institute, Caregiving in the U.S. (2015), available at https://www.aarp.org/content/dam/aarp/ppi/2015/caregiving-in-the-united-states-2015-report-revised.pdf.
[7] Justice in Aging, "Older Women and Poverty," available at https://www.justiceinaging.org/wp-content/uploads/2018/12/Older-Women-and-Poverty.pdf.
[8] Campbell, Stephen. "New Research: 7.8 Million Direct Care Jobs Will Need to Be Filled by 2026," (Jan. 24, 2019), available at https://phinational.org/news/new-research-7-8-million-direct-care-jobs-will-need-to-be-filled-by-2026/

HCBS Policy Solutions that Support Families & Caregivers

To empower all older adults to have a meaningful choice to age at home and in their communities while supporting families and caregivers, we must:

- **Expand Medicare coverage to include home and community-based services**. Modernize the Medicare program by expanding coverage for HCBS for all Medicare beneficiaries. The Bipartisan Budget Act of 2018 (BBA) included provisions allowing Medicare Advantage (MA) plans to cover more services like personal assistance, respite care, and adult day health care. We know that those with the highest needs typically do not enroll in MA or disenroll when their needs increase.[9] So while the availability of HCBS in MA is a good start, this additional coverage will not be available to two-thirds of all Medicare beneficiaries who are enrolled in original Medicare.
- **Make Medicaid HCBS a Mandatory Benefit**. Medicaid has an institutional bias because nursing facility care is a mandatory benefit whereas Medicaid HCBS are optional. Making Medicaid HCBS mandatory would address this institutional bias and ensure that older adults and people with disabilities do not have to wait for years on waitlists to receive services to remain in their homes and communities.
- **Make spousal impoverishment rules for HCBS permanent.** Medicaid's "spousal impoverishment protections" make it possible for an individual who needs a nursing home level of care to qualify for Medicaid while allowing their spouse to retain a modest amount of income and resources. Since 1988, federal Medicaid law has required states to apply these protections to spouses of individuals receiving institutional LTSS. Congress extended this protection to eligibility for HCBS in all states beginning in 2014, so that married couples have the same financial protections whether care is provided in a facility or in the community. Making this policy permanent (as proposed in H.R. 1343) would ensure that couples can continue to live together in their homes and communities as they age and families can stay together when caring for loved ones with disabilities and conditions such as dementia, multiple sclerosis, or traumatic brain injury.
- **Permanently Fund Money Follows the Person**. The Money Follows the Person (MFP) program providing additional funding to state Medicaid programs to help individuals residing in institutions overcome key barriers to moving back to their communities. MFP funds help pay for transition expenses not typically covered by Medicaid, such as an apartment security deposit or first month's rent. To date, the program has moved over 91,000 people with disabilities and aging individuals from institutional settings back to their communities and shown cost savings.[10] Permanently funding MFP (as proposed in H.R. 1342) would allow states to build robust programs to help older adults return to their communities.

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[9] Health Care Policy and Law, "Analysis of Drivers of Disenrollment and Plan Switching Among Medicare Advantage Beneficiaries," (Feb. 2019), available at https://jamanetwork.com/journals/jamainternalmedicine/article-abstract/2725083.

[10] Report to the President and Congress, "The Money Follows the Person (MFP) Rebalancing Demonstration," (Jun. 2017), available at https://www.medicaid.gov/medicaid/ltss/downloads/money-follows-the-person/mfp-rtc.pdf

- **Enact Universal Family Care**. Currently, the Family Medical Leave Act provides just 12 weeks of unpaid leave to eligible workers who need to care for their own or family member's medical needs. Most individuals cannot afford to take unpaid leave. Developing a social insurance program that combines LTSS, childcare, and paid family and medical leave would 1) address the shortage of caregivers by providing a source of payment; 2) allow more older adults and people with disabilities to age in their homes and communities; 3) ensure caregivers – particularly women - are not economically penalized for acting as caregivers; 4) improve the economic security of families.[11]
- **Make workforce Investments**. Direct caregiver positions often offer low compensation, insufficient training, and limited advancement opportunities. Turnover is high and shortages are reported across the country. In order to meet the demand of filling 7.8 million jobs, investments must be made such as enacting the Domestic Workers Bill of Rights Act[12], establishing a minimum wage floor for caregivers, enhancing training and career advancement opportunities, and improving retention and recruitment.[13]

II. Economic Security

As noted previously, more seniors are aging into poverty and experiencing homelessness for the first time after age 50.[14] Improved policies are needed to increase the economic security of older adults – particularly for those who are experiencing poverty at the highest rates.

- **Adopt the Elder Economic Security Standard Index (Elder Index) to better measure older adults' economic security and eligibility for assistance**. The calculation looks at the cost of meeting an older person or couple's basic needs, including shelter, food, health care and other essentials basing estimates on a person's geographic location, down to the state and county level. For example, a single elder renter living in Omaha, Nebraska would need $673 per month for housing expenses and $256 to cover food, while the same person living in Boston would have similar food expenses but need $1226 for housing.[15]
- **Modernize the Supplemental Security Income (SSI) program**. The current SSI benefit level and strict eligibility rules are failing to lift the older adults who rely on the program out of poverty. As more older adults come to depend on SSI when their resources and other sources of income become insufficient to support them, we must ensure that the program meets their needs. An older adult receiving Social Security and SSI benefits should not be living below the poverty level. The federal benefit amount should be

[11] National Academy of Social Insurance, "Designing Universal Family Care," (2019), available at https://universalfamilycare.org/wp-content/uploads/2019/06/Designing-Universal-Family-Care_Digital-Version_FINAL.pdf

[12] S.2112 - Domestic Workers Bill of Rights Act, introduced July 15, 2019.

[13] PHI and Caring Across Generations, "Workforce Matters: The Direct Care Workforce and State-Based LTSS Social Insurance Programs," (2019), available at file:///Users/AmberChrist%201/Downloads/Workforce-Matters-PHI-and-CAG-2019%20(3).pdf

[14] New York Times, "Old and on the Street, The Graying of America's Homeless," (May 2016), available at https://www.nytimes.com/2016/05/31/us/americas-aging-homeless-old-and-on-the-street.html.

[15] Elder Index, available at https://www.ncoa.org/economic-security/money-management/elder-index/

increased, and the financial resource and income eligibility rules (some of which haven't been adjusted for inflation for decades) should be updated (as proposed in H.R. 4280).

- **Make Medicare more affordable.** By increasing the eligibility income and resource limits for the Medicare Savings Programs (MSPs) (H.R. 4671) and low-income subsidy for Part D prescription drug limits (H.R. 4583; H.R. 4620), older adults would be able to keep more of their income to meet their basic needs.[16]
- **Add dental, vision, and hearing to Medicare.** A huge portion of out-of-pocket spending for older adults is for services not covered by Medicare, and many low-income beneficiaries simply have no access to these services. For example, in 2016, nearly 1 in 5 Medicare beneficiaries with low incomes did not get needed dental care because of costs and 71% of Black Medicare beneficiaries did not see a dentist at all in the past year.[17] Congress should pass legislation to include coverage for comprehensive oral health, vision and hearing under Medicare Part B. This would both open access to basic health care to older adults whose dental, vision, and hearing needs are unmet as well as eliminate high out-of-pocket medical expenses that contribute to their economic insecurity.
- **Expand the Medicaid Personal Needs Allowance.** Under federal law, nursing facility residents who are on Medicaid are required to contribute most of their income and savings towards the cost of care. However, they are allowed to retain a small amount of their own money, known as the personal needs allowance (PNA), to pay for basic expenses such as clothing or a haircut. The current federal minimum PNA of $30/individual and $60/couple is woefully inadequate and of has not been increased since 1988. Congress should raise the federal minimum PNA and modernize the program by indexing those amounts to inflation (HR 3853).
- **Improve Housing Affordability**. Our housing supports are failing seniors as more and more experience homelessness. The Section 202 Supportive Housing for Elder program needs funding for both new construction and to help preserve and maintain existing units needing repair. Currently, for every one housing unit that becomes available, there are 10 older adults in need of a unit.[18] Congress should also increase funding for other sources of housing assistance, including the Section 8 program, Public Housing capital account, Public Housing operating account, Community Development Block Grant, and HOME program.
- **Increase income eligibility for tax credits**. The federal Earned Income Tax Credit (EITC) has been proven to increase the income of low-paid workers, who are predominately women and people of color. Expanding the credit to higher income households and to

[16] See Justice in Aging's Letter in Support of HR 3 to strengthen Medicare and expand access to benefits, (Oct. 16, 2019), available at https://www.justiceinaging.org/wp-content/uploads/2019/10/Letter-Supporting-HR-3-Improvements-to-Medicare.pdf

[17] Kaiser Family Foundation, "Drilling Down on Dental Coverage and Costs for Medicare Beneficiaries," (Mar. 2019), available at https://www.kff.org/medicare/issue-brief/drilling-down-on-dental-coverage-and-costs-for-medicare-beneficiaries/

[18] Sermons, M.W, & Henry, M., Homelessness Research Institute, "The Demographics of Homelessness Series: The Rising Elderly Population," (April 2010), available at https://endhomelessness.org/resource/the-rising-elderly-population/.

older adults working beyond retirement age would increase economic security for millions of older adults who cannot afford to retire at age 65.[19]

Creditors as Payees

Creditors, such as nursing homes and assisted living facilities, serve as payees for thousands of beneficiaries who reside in these facilities, under the representative payee program of the Social Security Administration (SSA). Given the inherent conflicts of interest between a creditor acting as a representative payee and the beneficiary, there must be adequate consumer protections and oversight to ensure that beneficiaries are not harmed by this arrangement. SSA's proper oversight of the representative payee program is important to ensuring the economic security and well-being of aging Americans who need someone to help them manage their benefits.

- **Identification and Tracking of Creditors Acting as Representative Payees.** SSA currently has special procedures for fee-for-service (FFS) representative payees, but does not identify creditors (who are not taking a fee to act as representative payees) separately from other organizational payees. This means that there is currently no transparent way to identify how many creditors are acting as representative payees. Creditors should be identified in their own category by SSA and they should undergo audits every three years. Increased audits would incentivize facilities to become more familiar with the rules of the benefit programs and to become better stewards of their residents' benefits.
- **Stronger Enforcement of the Payee Preference List.** When an institution that would be both payee and creditor applies to SSA to become the beneficiary's payee, SSA should do a thorough search, to determine if there is another potential payee available that is higher on the payee preference list, such as a relative of the beneficiary, or a public or nonprofit agency or organization. Appointing a facility as payee which is also the beneficiary's creditor should always be a last resort, and they should only be appointed when no other suitable alternative is available.
- **Improved Beneficiary Protections for All with Institutional Representative Payees, Including Creditors.**
    - **Prohibit Any Requirements That Creditors Be Appointed Representative Payees.** Clauses in admissions contracts requiring residents to have the facility act as the representative payee not only flouts the SSA's discretion and preferred list of representative payees, but also places an unfair burden on beneficiaries who may have limited choices over where they can receive appropriate care. Any facility that includes these provisions in admissions contracts should be specifically banned from acting as representative payees for any beneficiaries until SSA can determine that the facility is no longer using the contractual

[19] See for example, Center for Budget and Policy Priorities, "Expansions of Earned Income Tax Credit and Child Tax Credit would Benefit 8 million Black Households," (Sep. 2019), available at https://www.cbpp.org/research/federal-tax/expansions-of-the-earned-income-tax-credit-and-child-tax-credit-would-benefit-8

language and the facility has been trained on how to appropriately act as a representative payee.

- **Require Disclosures to Beneficiaries and Family Members Who Agree to Have a Creditor Appointed as a Representative Payee.** Similarly, facilities that suggest or encourage residents to have the facility named as the representative payee should be required to provide information to the beneficiary as well as family members or other interested parties involved in the process (such as a social worker or advocate). Helpful and clear information could prevent beneficiaries from feeling forced into a relationship with the facility that is against their best interest.
- **Increased Penalties for Creditors That Misuse or Steal Beneficiaries' Funds.** There are few repercussions for representative payees that misuse or steal beneficiaries' funds. Even in extreme cases, bad actors are usually simply required to return funds and may continue to act as representative payees for other beneficiaries. Without any repercussions, there is no incentive for facilities to follow the rules or attempt to comply with any guidance from the SSA. This could easily be remedied by imposing fines or penalties in these situations, such as is done to bad actors in other industries such as companies found violating banking regulations or environmental regulations.

III. Elder Justice

Approximately, one in ten Americans over the age of 60 have experienced some form of elder abuse.[20] Research shows that older adults who are members of traditionally stigmatized groups are at higher risk.[21] For example, Black older adults are significantly more likely to be victims of financial exploitation and psychological mistreatment[22], while Asian American older adults can be more likely to view elder abuse as existing only within the family, making the risk of abuse from outside actors higher.[23] Elder abuse prevention must target not only the general public, but also be tailored to accommodate the different ways abuse manifests among various cultural groups.

- **Increase access to legal services**. Older adults require legal help when they face loss of their housing through eviction, foreclosure, elder financial exploitation, predatory lending, discrimination on the basis of age, disability, race, gender, and sex, and other forms of emotional, physical, and financial abuse. Legal services also help older adults access crucial programs, such as SSI and Medicaid, and other public benefits that help them meet their basic needs. Increasing funding for legal services through Title IIIB of

[20] National Council on Aging, "Elder Abuse Facts," available at https://www.ncoa.org/public-policy-action/elder-justice/elder-abuse-facts/.
[21] National Center on Elder Abuse, "Statistics and Data," available at https://ncea.acl.gov/What-We-Do/Research/Statistics-and-Data.aspx#18
[22] National Center on Elder Abuse, "Mistreatment of African American Elders," (2016), available at https://ncea.acl.gov/NCEA/media/Publication/ResearchToPracticeAfAm.pdf.
[23] National Center on Elder Abuse, "Mistreatment of Asian Pacific Islander (API) Elders," (2013), available at https://ncea.acl.gov/NCEA/media/Publication/Mistreatment-of-Asian-Pacific-Islander-API-Elders-2013.pdf.

the Older Americans Act would allow programs to assist more older adults in need of legal services. Legal services for LGBTQ seniors and seniors of color are even more critical since they face intersecting and compounding forms of discrimination.

- **Protect the Rights & Wellbeing of Residents of Nursing and Assisted Living Facilities.** Assisted living is an increasingly common Medicaid benefit but, because assisted living is generally funded through Medicaid HCBS programs, federal funding generally comes with minimal quality of care oversight. A February 2018 GAO report identified the many problems with current federal oversight, but as yet Congress has taken no action. Congress should emphasize resident rights and key quality of care provisions as a condition of Medicaid funding.

  In September 2016, the Centers for Medicare & Medicaid Services (CMS) issued revised nursing home regulations that had been thoughtfully developed over four years to promote residents' health and safety. Since 2017, CMS has been backtracking and weakening resident protections. We urge Congress in its oversight capacity to ensure CMS retains the 2016 regulatory language, which is currently under review, and to not weaken the enforcement system.

Conclusion

We appreciate the Committee's attention to the acute and growing needs of older adults, particularly those who have been marginalized and are living in or at risk of aging into poverty. Thank you for consideration of our comments and recommendations, including the resources linked below, to address some of these needs. If any questions arise concerning this submission, please contact Jennifer Goldberg, Deputy Director, at jgoldberg@justiceinaging.org.

Additional Justice in Aging Resources

- Older Women and Poverty (2018)
- Skilled Nursing Facilities and Other Creditors Acting as Representative Payees (2018)
- Advocacy Starts at Home Strengthening Supports for Low-Income Older Adults and Family Caregivers (2016)
- How to Prevent and End Homelessness Among Older Adults (2016)
- LGBT Older Adults in Long-Term Care Facilities: Stories from the Field (2015)