

2024 New Final Rules: Enduring Access to Services *by CMS* Older Americans Act *by ACL*

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Ensuring Access to Medicaid Services Final Rule for Home and Community-Based Services (HCBS) (89 FR 40542)

Published May 10, 2024
by the Centers for Medicare and Medicaid Services
(CMS)

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Reasons for the Ensuring Access Final Rule

- Workforce shortages are reducing access to services and are expected to worsen in the future.
- Inadequate investment in oversight and monitoring increases risks for poor quality of care and harm for people receiving Home and Community Based Services (HCBS).
- Gaps in measurement and reporting prevent CMS and states from assessing and improving HCBS quality and outcomes and addressing racial and other disparities.

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Ensuring Access Final Rule Requirement Highlights

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Oversight of Person-Centered Planning

Establishes standardized annual reporting requirements and sets a 90% minimum performance level for states related to:

- Percent of individuals continuously enrolled for at least 365 days who received a reassessment of functional need at least every 12 months; and
- Percent of individuals continuously enrolled for at least 365 days who had the person-centered service plan reviewed, and revised as appropriate, based on the results of the required reassessment of functional need at least every 12 months.

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Person-Centered Planning Implementation

- *Proposed Deadline:* July 2027
- *Effort to Comply:* Low
- *Compliance Risks (or Dependencies):* All PCP are required to be reviewed annually for waiver. Current 372 reports indicate:
 - 100% compliance for CDD Waiver;
 - 99% compliance for DDAD Waiver;
 - 99% compliance for AD Waiver; and
 - 100% compliance for TBI Waiver.
- *Impacts:* Waivers. No change in Service Coordination or Quality Expectations.

Grievance System

Requires states to establish a grievance (complaint) system in fee-for-service Home and Community-Based services.

- Sets requirements for a state's grievance system to allow beneficiaries to file a grievance related to state or provider performance of person-centered planning, service plan requirements, and HCBS settings requirements.
- Beneficiaries and their authorized representatives can involve other individuals or entities of their choosing to assist them throughout the grievance process, in addition to filing a grievance.
- Authorized representatives or other individuals (including family members or other beneficiaries) are protected from punitive action when helping beneficiaries file grievances.

Grievance System Implementation

- *Proposed Deadline:* July 2026
- *Effort to comply:* Low
- *Compliance Risks (or Dependencies):* Allow participants to file grievances related to the state or a provider's performance of person-centered planning and service plan requirements and HCBS settings requirements. Current waivers state: Participants receiving supports through the waiver may register the following types of grievances/complaints:
 - Safety, endangerment, or welfare issues;
 - Suspicion of Medicaid fraud;
 - Violations by DDD Medicaid providers of Medicaid regulations, DDD regulations, or DDD policies;
 - Issues related to a participant's Service Coordinator; or
 - Difficulty with DDD Medicaid services or providers.
- *Impacts:* Waivers and regulations.

Nationwide Incident Management System Standards

Use nationwide definitions of critical incidents to include, at a minimum:

- Verbal, physical, sexual, psychological, or emotional abuse;
- Neglect;
- Exploitation including financial exploitation;
- Misuse or unauthorized use of restrictive interventions or seclusion;
- A medication error resulting in a telephone call to, or a consultation with, a poison control center, an emergency department visit, an urgent care visit, a hospitalization, or death; and
- Unexplained or unanticipated death, including but not limited to a death caused by abuse or neglect.

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Nationwide Incident Management System

- *Proposed Deadline:* July 2027
- *Effort to Comply:* Low
- *Compliance Risks (or Dependencies):* Alignment of definitions of critical incidents with nationwide definitions. Current waivers define incidents requiring an incident report to DDD as:
 - Situations, which may adversely affect the physical or emotional well-being of the participant;
 - Alleged or suspected cases of abuse, neglect, exploitation, or mistreatment; and
 - Emergency safety situations requiring the use of emergency safety interventions.
- *Impacts:* Waivers, regulations, policies, and procedures.

Incident Management & Critical Incident Reporting

- Operate and maintain an electronic incident management system to identify report, triage, investigate, resolve, track, and trend critical incidents.
- Requires providers to report to the state, within state-established timeframes and procedures, any critical incident that occurs during the delivery of services or as a result of the failure to deliver services.
- Requires the use of other data sources (such as claims, the Medicaid Fraud Control Unit, Child and Adult Protective Services, and law enforcement) to the extent permissible under state law to identify critical incidents that are unreported by providers and occur during the delivery of services or as a result of the failure to deliver services.

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Critical Incidents

- Requires information sharing of the status and resolution of investigations between the state and the entities responsible for investigating critical incidents if the state refers critical incidents to other entities for investigation.
- Requires separate investigation of critical incidents if the investigative agency fails to report the resolution of an investigation within state-specified timeframes.

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Incident Management & Critical Incident Implementation

- *Proposed Deadline:* July 2027
- *Effort to Comply:* Low
- *Compliance Risks (or Dependencies):* Requires states to operate and maintain an electronic incident management system. Current requirements:
 - Incidents to be reported through Therap general event reports (GER); and
 - Requirements and procedures set for information and data sharing between DDD and Liberty.
- *Impacts:* Waivers, regulations, policies, and procedures.

Critical Incidents

- Standardized annual reporting requirements and a 90% minimum performance level related to the following occurring within state-specified timeframes:
 - Critical incident investigations are initiated;
 - Critical incidents are investigated and resolved; and
 - Corrective actions related to critical incidents are completed.
- Requires states to report on an incident management system assessment every 24 months (may be reduced to every 60 months for states that meet incident management system requirements).

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Critical Incident Implementation

- *Proposed Deadline:* July 2027
- *Effort to Comply:* Low
- *Compliance Risks (or Dependencies):* Requires information sharing of status and resolutions between the state and entities responsible for investigation. Reporting requirements and 90% minimum performance level. Requirements of states reporting incident management system assessment every 24 months (may reduce to every 60 months for states meeting incident management requirements). Current 372 reports state:
 - 92-93% compliance for CDD Waiver;
 - 94-100% compliance for DDAD Waiver;
 - 97-100% compliance for AD Waiver; and
 - No data to measure for TBI Waiver.
- *Impacts:* Waivers. No change in Service Coordination or Quality Expectations.

HCBS Payment Reporting Requirements

Requires states to report the percentage of payments for certain HCBS spent on compensation for direct care workers.

- First step requires states report on their readiness to collect data regarding the percentage of Medicaid payments for homemaker, home health aide, personal care, and habilitation services spent on compensation to direct care workers. (July 9, 2027)
- Second step requires an annual report on the percentage of payments. (July 9, 2028)

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HCBS Payment Minimum Performance Level

Requires at least 80% of payments for homemaker, home health aide, and personal care services used for compensating direct care workers who provide the services.

- Administrative overhead or profit of 20%* or less of the payments;
- Clinical supervisors are included in direct care workers;
- Excludes costs associated with travel, training, and personal protective equipment (PPE) for direct care workers from the calculation; and
- Requires states to report separately on facility-based services.

**Subject to certain flexibilities and exceptions in the HCBS payment adequacy provision.*

HCBS Payment Minimum Performance Level Implementation

- Payment Minimum Performance Standard (80/20 rule)
- *Proposed Deadline*: July 2030
- *Effort to Comply*: High
- *Compliance Risks (or Dependencies)*: Not yet identified.
- *Impacts*: Waiver, providers, and finance.

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HCBS Payment Adequacy Provision

A state has the option to establish:

- A hardship exemption based on a transparent state process and objective criteria for providers facing extraordinary circumstances.
 - States must submit a plan, subject to CMS review and approval, for reducing the number of providers that qualify for a hardship exemption within a reasonable time.
- A separate performance level for small providers meeting state-defined criteria based on a transparent state process and objective criteria.
 - States must submit a plan, subject to CMS review and approval, for small providers to meet the 80% minimum performance requirement within a reasonable time.

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HCBS Payment Adequacy Provision

- CMS may waive the plan reporting requirements if the state demonstrates it has applied the small provider minimum performance level or the hardship exemption to less than 10 percent of the state's providers
- This provision also exempts the Indian Health Service and Tribal Health programs subject to 25 U.S.C. 1641 from complying with its requirements.

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Payment Adequacy Implementation

- Payment Adequacy Reporting for Personal Care
- *Proposed Deadline:* July 2028
- *Effort to Comply:* High
- *Compliance Risks (or Dependencies):* Not yet identified.
- *Impacts:* Waiver, regulations, providers, and finance.

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Waiting List and Access Reporting Requirements

Requires states to report annually on waiting lists for section 1915(c) waiver programs (and section 1115 demonstrations), including:

- A description of how the state maintains the waiting list;
- Number of people on the waiting list; and
- Average amount of time new waiver enrollees waited to enroll.

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Waiting List and Access Reporting Implementation

- *Proposed Deadline:* July 2027
- *Effort to Comply:* Medium
- *Compliance Risks (or Dependencies):* Implementation may be a significant data lift given the specific demographic breakdowns required in the reporting.
- *Impacts:* Waiver, regulations, statutes, service coordination, eligibility and enrollment, finance, and providers.

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Service Delivery Reporting Requirements

Requires states to report annually on:

- Average amount of time from when services were approved to when they started for individuals newly approved for homemaker, home health aide, personal care, and habilitation services within the past 12 months; and
- Percent of authorized hours for homemaker, home health aide, personal care, and habilitation services provided within the past 12 months

Note: States may report metrics using statistically valid random sampling of beneficiaries.

Service Delivery Reporting Implementation

- *Proposed Deadline:* July 2027
- *Effort to Comply:* Medium
- *Compliance Risks(or Dependencies):* Requires data of the timeframe of when Homemaker, home health aide, personal care, and habilitation services were approved and implemented and the percent of authorized hours.
- *Impacts:* Eligibility and Enrollment, Service Coordination, Quality, and Waiver.

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Website Transparency

Promotes public transparency related to the administration of Medicaid-covered HCBS through public reporting of quality, performance, and compliance measures.

- Requires the state to operate a website that provides the results of the HCBS reporting requirements and meets availability and accessibility requirements.
- Requires CMS to report on its website the results of the HCBS reporting requirements that states report to CMS.

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Website Transparency Implementation

- *Proposed Deadline:* July 2027
- *Effort to Comply:* High
- *Compliance Risks (or Dependencies):* Requires transparency on public reporting of quality, performance, and compliance measures.
- *Impacts:* Service Coordination, website development, and Data Team.

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Quality Measure Set

- Sets the process for CMS to develop and update, no more frequently than every other year, the HCBS Quality Measure Set through a process that allows for public input and comment, including through the Federal Register.
- Requires states to report every other year on mandatory measures in the HCBS Quality Measure Set and establish performance targets and quality improvement strategies. Also allows for reporting on additional voluntary measures and for CMS to report on certain measures on a state's behalf.
- Phases in requirements for stratification of data for certain measures by race, ethnicity, sex, age, rural/urban status, disability, language, or other factors.

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Quality Measure Set Implementation

- *Proposed Deadline:* July 2028
- *Effort to Comply:* Medium
- *Compliance Risks (or Dependencies):* Not yet identified
- *Impacts:* Service Coordination, quality, Data Team, waivers, policy, and regulations.

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Final Rule for Older Americans Act Programs (89 FR 11566)

Published February 14, 2024
by the Administration for Community Living (ACL)

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Older Americans Act (OAA) Overview

- First passed in 1965 and last reauthorized on March 25, 2020.
- Authorizes a range of programs and services that help older adults age in place, including:
 - Home-delivered and congregate meals, support for family caregivers, preventive health services, personal and home care services, transportation, legal assistance, and more (Title III);
 - Nutrition and supportive services for Native American elders and caregivers (Title VI);
 - Ombudsman services for people who live in long-term care facilities, prevention of elder abuse, and elder rights promotion (Title VII).

The OAA Final Rule Overview

- This rule has not been updated since 1988.
- This rule specifically applies to OAA Titles III, VI, and VII.
- There are approximately 65 – 70 requirements in the 2024 Final Rule for which states must have policies and procedures in place.
 - There is a document that lists each policy and procedure requirement, to assist states in development and compliance.
 - *Nebraska has obtained a copy of this document for internal use.*
- Questions can be emailed to: aging@advancingstates.org.

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Purpose of the Final Rule

The majority of what is in the final rule are **long-established OAA requirements**, reaffirming what is in statute, prior regulations, or existing policies – rather than new requirements:

- Updating regulations to align with current statute;
- Reflecting the needs of today's older adults;
- Promoting appropriate stewardship of OAA resources;
- Clarifying programmatic requirements;
- Supporting the national aging network that delivers OAA services; and
- Improving program implementation to better serve older adults and caregivers.

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Roles and Responsibilities

For State Agencies and Area Agencies on Aging

Key provisions of the final rule include:

- Fiscal and service delivery requirements;
- Planning and service area (PSA) and AAA designation requirements;
- Responsibilities to avoid conflict of interest; and
- Expectations for contracts and commercial relationship.

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OAA Final Rule

New and Updated Definitions

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Conflicts of Interest

- One or more conflicts between the private interests and the official responsibilities of a person in a position of trust.
- One or more conflicts between competing duties of an individual, or between the competing duties, services, or programs of an organization, and/or portion of an organization.
- Other conflicts of interest identified in guidance issued by the Assistant Secretary for Aging and/or by State agency policies.

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Greatest Economic Need

The need resulting from an income level at or below the Federal poverty level and as further defined by State and area plans based on local and individual factors, including geography and expenses.

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Greatest Social Need

The need caused by non-economic factors, which include:

- Physical and mental disabilities;
- Language barriers; and
- Cultural, social, or geographical isolation, including due to:
 - Racial or ethnic status, Native American identity;
 - Housing instability, food insecurity, lack of access to reliable and clean water, lack of transportation, rural location, or utility assistance needs;
 - Religious affiliation;
 - Sexual orientation, gender identity, or sex characteristics;
 - HIV status;
 - Chronic conditions; and
 - Interpersonal safety concerns.

Also includes any other status that:

- Restricts the ability of an individual to perform normal or routine daily tasks
- Threatens the capacity of the individual to live independently
- Other needs as further defined by State and area plans based on local and individual factors

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In-Home Supportive Services

Supportive services provided in the home as set forth in the Act, to include:

- Homemaker, personal care, home care, home health, and other aides;
- Visiting and telephone or virtual reassurance;
- Chore maintenance;
- Respite care for families, including adult day care; and
- Minor modification of homes necessary to facilitate the independence and health of older individuals and not readily available under another program.

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OAA Final Rule Changes Required

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Contract Oversight

The state will be required to provide prior approval to Area Agency on Aging (AAA) contracts and commercial relationships.

- The state and AAA are expected to work together to create a streamlined process for state review and approval of contracts.
- The state must create policies and procedures to support the review process.
- *Some reasoning:* The state is ultimately responsible for ensuring appropriate use of funds, and the approval of contracts will be able to help states monitor how funds are being used.
- *Note:* State agencies are not parties to these contracts and commercial relationships.

Conflicts of Interest (COI)

State

- The state will be required to have policies and procedures to avoid actual and perceived COI.
- The state must identify, remove, and remedy any existing COI at organizational and individual levels.
- The state must provide oversight of AAAs to ensure all COI requirements are being met.

AAAs

- AAAs will be required to have policies and procedures to identify organizational and individual COI, including AAA employees, contractors, grantees, volunteers, and others in positions of trust.

Note: Documentation of mitigation strategies is required when a state agency, AAA, or Title III agency operates an Adult Protective Services (APS) or guardianship program.



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Emergency Preparedness and Response

Key provisions of the final rule include:

- New sections to support older adults and family caregivers, including those in tribal communities, during emergencies and disasters
- Flexibilities for addressing emergency preparedness and response
- Lessons learned from the pandemic

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Emergency Management

The state will be required to establish an emergency plan.

- The emergency plan must include:
 - A continuity or operations plan and an all-hazards emergency response plan;
 - A plan to coordinate activities with appropriate entities; and
 - A process for developing long-range emergency and disaster preparedness plans.
- The state may take advantage of disaster flexibilities under Title III to provide disaster services and the state's own funding.
- The state, AAAs, and Title VI programs are expected to coordinate in emergency and disaster preparedness planning, response, and recovery.

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Ombudsman Office Placement

Requirements to ensure there are no COI based on Ombudsman location.

- Placing the Ombudsman's office in the following organizations will represent an OCI:
 - Agency that provides long-term care services under a Medicaid waiver or Medicaid state plan;
 - Agency that sets reimbursement rates for long-term care services or long-term care facilities; and
 - Agency provides long-term care coordination or case management, including for residents of long-term care facilities.
- *Note:* The Ombudsman office may have to physically move location to meet this requirement, but the intent is to use more firewall protection or other avenues to avoid COI, first.

Ombudsman Memorandum of Understanding (MOU)

The state Ombudsman will be required to adopt MOUs with specific agencies.

- Required:

- Legal Assistance Programs (must have strategy for when both programs are providing services to a resident).
- State Licensure and Certification Programs (Survey and Cert).

- Recommended:

- State Mental Health Authority, AAAs, Aging & Disability Resource Centers, APS, Protection & Advocacy Agency, Medicaid Fraud Control Unit, Victim Assistance Programs, Law Enforcement, Courts, State Legal Assistance Developer.



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Nutrition Flexibilities and Modernization

Key provisions of the final rule include:

- Updates of nutrition rules;
- Clarification of requirements for transfers of funds between programs; and
- Allowance for a limited number of “carry-out” and similar meals to be provided through the congregate meals program, in some circumstances

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Nutritional Services (Grab & Go Meals)

- States will be able to use Title III, part C-1 (congregate meals) funds for grab & go meals.
- In order to use Part C-1 Funds, the state must:
 - Provide information in the State Plan about the use of Part C-1 funds;
 - Not exceed 25% of total C-1 funding at the state or AAA level; and
 - Ensure meals complement the congregate meal program
- *Examples:* Being used during disaster or emergency situations or given to older adults in need/that have regular need for such a meal based on individualized assessment.

State Plans on Aging – New Timelines

- A draft of a State Plan or amendment submitted to the ACL Regional Office must be submitted 120 days before the effective date.
- A State Plan or amendment submitted to Assistant Secretary for Aging must be submitted 90 days before the effective date.
- State Plans will be required to have a minimum of a 30-day public comment period.

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State Plans on Aging – Additional Core Elements

- The state must provide evidence the State Plan is informed by area plans in states with multiple planning and service areas (PSAs).
- The state must provide an explanation of how individuals with the greatest economic need and greatest social need are determined and served.
- The state must provide a description of how the state will meet LAD responsibilities.

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Family Caregivers

Key provisions of the final rule include:

- Key definitions of “family caregivers” and “older adult relative.”
- Clarification on requirements for family caregiver support services, allowable use of funds, and the method of funds distribution.

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Services for Native American Elders and Caregivers

Key provisions of the final rule include:

- Clarification to reduce confusion and improve consistency in the provision of services by combining provisions related to American Indians, Alaska Natives—Part 1322, and Native Hawaiians—Part 1323;
- Specification of program and fiscal requirements; and
- Expectations for collaboration and coordination between programs for all older adults and caregivers and specifically those for Native American elders and caregivers.

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National Family Caregiver Support Program

- OAA Final Rule confirms statutory definition of a family caregiver may be interpreted broadly.
- States will be required to have a plan to provide all five caregiver supports:
 - Information;
 - Referral and Assistance;
 - Supportive Counseling;
 - Respite; and
 - Supplemental Services (such as homemaker or home modifications).

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Participant Service and Priority

- The state and/or AAA must ensure service to those identified as priority groups through assessment of local needs and resources.
- The state and/or AAA must establish criteria to prioritize delivery of services under Title III, parts B (except Ombudsman program services), C, and D.

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OAA Final Rule New Requirements

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Legal Assistance

The state will be required to offer legal assistance services to protect elder rights. *(ACL will provide technical assistance.)*

- Legal assistance providers will be required to enter a Memorandum of Understanding (MOU) with the Ombudsman and collaborate with other programs that address/protect elder rights.
- It is expected these services be used to divert older adults from guardianship to less restrictive forms of decisional support whenever possible.
- Prohibited Actions:
 - Cost sharing and requesting contributions from clients before or during representation (after is allowable);
 - Asking about a client's personal or family financial information as a condition of establishing eligibility; and
 - Fee-generating cases (limited exceptions, not specified).

Legal Assistance Developer (LAD) Position

The state must designate the LAD and describe the office and its duties/activities in the State Plan. *(ACL will provide technical assistance.)*

- This position is intended to assist with managing compliance to the legal assistance program.
- The state must ensure the LAD is able to fulfill their duties which includes providing training and assistance to legal assistance providers and coordinating with the Ombudsman program.
- The state must create policies and procedures to ensure the LAD is not permitted to hold positions or perform duties that would constitute a COI.

Title III and Title VI Coordination

The state will be required to develop coordination between Title III and Title VI programs. *(ACL will provide technical assistance.)*

- The state is required to create policies and procedures, developed with relevant Title VI program director(s), explaining how the state's aging network will coordinate with any Title VI funded programs.

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Compliance Deadline for OAA Final Rule

- States are expected to meet compliance by October 1, 2025.
- If a state is not able to meet compliance by this time, the Administration for Community Living (ACL) will accept a Corrective Action Plan (CAP) request.
- ACL started accepting CAP requests April 1, 2024.

Based on conversations with the State Unity on Aging, it is not anticipated Nebraska will be unable to comply or need to request a CAP.

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