



Program Letter 01-3

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To: All LSC Program Directors

From: Randi Youells, Vice President for Programs

Subject: **Interim Guidance on 45 CFR Part 1639 in Light of the Supreme Court's Decision in *Legal Services Corporation v. Velazquez, et al.***

On February 28, 2001, the United States Supreme Court issued a decision in *Legal Services Corporation v. Velazquez, et al.*, Nos. 99-603 and 99-960, 121 S. Ct. 1043, 2001 WL 193738 (U.S.), striking down as unconstitutional the restriction prohibiting LSC grantees from challenging welfare reform laws when representing clients seeking specific relief from a welfare agency. LSC intends to revise its regulations at 45 CFR Part 1639 to bring them into conformity with the Supreme Court's *Velazquez* decision. In the meantime, however, LSC is issuing this interim guidance on the effect of the *Velazquez* decision on LSC's regulations.

Background

The stricken restriction was first imposed by Congress in §504(a)(16) of the FY 1996 Legal Services Corporation appropriations legislation (the Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. 104-134, 110 Stat. 1321-53 (1996)) and has been retained in each subsequent annual LSC appropriation. The relevant portion of §504(a)(16) prohibits funding of any organization:

that initiates legal representation or participates in any other way, in litigation, lobbying, or rulemaking, involving an effort to reform a Federal or State welfare system, except that this paragraph shall not be construed to preclude a recipient from representing an individual eligible client who is seeking specific relief from a welfare agency if such relief does not involve an effort to amend or otherwise challenge existing law in effect on the date of the initiation of the representation.

This restriction was incorporated into LSC's regulations at 45 CFR Part 1639. Specifically, 45 CFR §1639.3, Prohibition, provides that:

Except as provided in §§1639.4 and 1639.5, recipients may not initiate legal representation, or participate in any other way in litigation, lobbying or rulemaking, involving an effort to reform a Federal or State welfare system. Prohibited activities include participation in:

- (a) Litigation challenging laws or regulations enacted as part of an effort to reform a Federal or State welfare system.
- (b) Rulemaking involving proposals that are being considered to implement an effort to reform a Federal or State welfare system.
- (c) Lobbying before legislative or administrative bodies undertaken directly or through grassroots efforts involving pending or proposed legislation that is part of an effort to reform a Federal or State welfare system.

45 CFR §1639.4, Permissible representation of eligible clients, provides that:

Recipients may represent an individual eligible client who is seeking specific relief from a welfare agency, if such relief does not involve an effort to amend or otherwise challenge existing law in effect on the date of the initiation of the representation.¹

The Velazquez Decision

The Supreme Court upheld the decision of the Court of Appeals and invalidated that portion of the statute which provides that representation of an individual eligible client seeking specific relief from a welfare agency may not involve an effort to amend or otherwise challenge existing law. The Court held that such a qualification constitutes impermissible viewpoint discrimination under the First Amendment because it "clearly seeks to discourage challenges to the status quo." 121 S. Ct. 1043, 1047 (2001). The Supreme Court also upheld the lower court's decision that the general restriction on litigation, lobbying, and rulemaking involving an effort to reform a Federal or State welfare system is valid since these restrictions prohibit recipient involvement in such activities regardless of "the side of the issue" the recipient advocates. *Id.*

¹ The exception at §1639.5 regarding public rulemaking and responding to requests with non-LSC funds is not at issue here and is not discussed. It remains valid and in place as written.

In determining what part of the 1996 Act to strike as invalid, the Supreme Court noted that the Court of Appeals concluded that congressional intent regarding severability was unclear and, therefore, decided to “invalidate the smallest possible portion of the statute, excising only the viewpoint-based proviso rather than the entire exception of which it is a part.” *Id.* at 1052. Since that “determination was not discussed in the briefs of either party or otherwise contested” in the appeal to the Supreme Court, the majority opinion noted that it was exercising its “discretion and prudential judgement” by declining to address the issue. *Id.* at 1053. The Court opted instead to simply affirm the decision of the Court of Appeals which left intact the exception permitting a grantee to represent an individual eligible client who is seeking specific relief from a welfare agency, while striking the limitation on the exception which provides that such a representation may not involve an effort to amend or otherwise challenge existing law.

Effect of the Decision on 45 CFR Part 1639

The effect of the *Velazquez* decision is to render the stricken language null and void. This means that the limitation on representation of an individual eligible client seeking specific relief from a welfare agency which prohibits any such representation from involving an effort to amend or otherwise challenge existing law is not valid and may not be enforced or given effect. Henceforth, an individual eligible client seeking relief from a welfare agency may be represented by a recipient without regard to whether the relief involves an effort to amend or otherwise challenge existing welfare reform law.

Please be advised, however, that in accordance with the opinion of the Supreme Court, the general restriction on initiating legal representation or participating in lobbying or rulemaking, involving an effort to reform a Federal or State welfare system remains in effect. Accordingly, actions which are prohibited under §1639.3 and not specifically excepted as part of the representation of an individual eligible client seeking relief from a welfare agency², continue to be prohibited.

Pending the issuance of a revised Part 1639, LSC will enforce Part 1639 in a manner consistent with the *Velazquez* decision and this guidance.

² Or, as permissible under §1639.5.