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**Re: Revisions to Performance Area Four**

This letter is in response to the Legal Services Corporation's (LSC) Notice of Proposed Rulemaking (NPRM) request for public comments regarding proposed revisions to LSC's Performance Criteria Area Four. These comments are submitted on behalf of NLADA by its Civil Council, the elected representative body that establishes policy for the NLADA Civil Division, and its Regulations Committee.

**Introduction**

The current Performance Criteria Area Four provides a solid framework for evaluating how a grantee performs in the areas of governance, leadership and administration. LSC's proposed additions provide grantees with comprehensive guidance on best practices in these areas, a variety of resources, and helpful and easily accessible links to these resources. Grantees can consider the areas of inquiry to evaluate their effectiveness, troubleshoot, or enhance current performance.

However, LSC's proposed amendments raise significant concerns regarding how new proposed indicators and areas of inquiry will be used by LSC when the Office of Program Performance (OPP) and the Office of Compliance Enforcement (OCE) conduct program reviews to evaluate the quality of legal assistance provided by grantees, and during the grants application process. LSC is already using the current Performance Criteria to mandate compliance with certain recommendations made by program staff in Program Quality Visit (PQV) reports identified as Tier One recommendations. If LSC intends to consider the extensive revisions to Performance Area Four as requirements that must be incorporated by a grantee regardless of the overall quality of a grantee performance, these additional areas of proposed indicators and areas of inquiry could be extremely burdensome and impractical. The application of LSC's extensive revisions must take into account whether a grantee is already meeting LSC's other three performance criteria, and whether requiring the additional criteria is practical, given the scarcity of resources and capacity grantees typically have to meet the critical need for their services.

As indicated in the introduction to the Performance Criteria:

Nationally, funding limitations prevent Legal Services programs from meeting more than a fraction of the need for their services. As a consequence, such programs continually must make difficult choices among very important needs and possible activities, and constantly face tradeoffs in which an increased commitment in one Performance Area may mean a lessening of emphasis in another. The Criteria are constructed with the awareness that at current resource levels programs may not be able to achieve the maximum theoretically possible in each of the major Performance Areas. In conducting assessments under the Criteria, reviewers must keep in mind that programs are compelled to balance competing needs: to assist as many as possible; to have maximum effectiveness for those who are clients; to have the broadest beneficial impact on the communities they serve; and to excel in each of the four Performance Areas.

The combination of limited resources and comprehensive responsibility for an entire service area creates a duty to focus on the most pressing civil legal needs. This concept of focusing on *most pressing civil legal needs* is central to the Criteria as a way of addressing the choice and triage compelled by less than full funding. LSC Performance Criteria: Introduction, pages 3-4.

<http://www.lsc.gov/sites/default/files/LRI/LSCPerformanceCriteriaReferencingABAStandards.pdf>

We recommend that the Performance Criteria be used as a resource for best practices, and not as an inclusive list of criteria grantees must meet to be considered effective by LSC. We are concerned that LSC's additions to the Performance Criteria Area Four<sup>1</sup> will be used as a compliance tool instead of a guide that grantees should consider in light of their programs' unique circumstances and priorities regarding the provision of high quality legal services. As indicated in the Introduction to the Performance Criteria programs, due to limited resources, grantees must make difficult choices and "constantly face tradeoffs in which an increased commitment in one Performance Area may mean a lessening of emphasis in another." Id.

In order to explore how implementing LSC's additions to Performance Criteria Area Four can foster the efficient and effective delivery of legal services, further input from grantees who are experienced in LSC grantee program governance and delivery is critical. When the previous Performance Criteria were amended, LSC convened a number of representatives experienced in LSC program management and representatives from the American Bar Association to play a major advisory role during the criteria revision process. During this revision period, LSC program management and other stakeholders have played a much more limited role in developing additional proposed indicators and areas of inquiry. We strongly urge LSC, prior to finalizing its changes, to consider holding workshop(s) or public forum(s)

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<sup>1</sup> Currently LSC's uses its Performance Criteria as enforcement tool by designating certain recommendations as Tier I recommendations in the Office of Grantee Performance's Grantee Quality Visits. Grantees are required to report on implementation of Tier I recommendations in their next Application or Renewal

to obtain input from other grantees and stakeholders in a manner that will provide the opportunity for dialogue between LSC and its grantees.

While we appreciate LSC's providing a comment period, submission of written comments does not provide an opportunity for discourse that could more effectively inform LSC of how the proposed revisions to the Performance Criteria Four can be incorporated to ensure appropriate oversight while simultaneously supporting the highest possible quality of service delivery.

We are concerned that because the Performance Criteria is used by LSC to conduct program performance evaluations and for its grants application process, LSC's significant revisions may be used in a manner that could be unduly burdensome, with the costs far outweighing potential benefits. The opportunity for LSC to engage in dialogue with its grantees was very helpful during LSC's consideration of major regulatory revisions to cost procedures (45 CFR 1630) and property acquisition procedures. The insights LSC gained hearing directly from grantees during this process, which included the opportunity to ask questions for clarification, provided LSC with a greater understanding of the impact of its revisions on grantees that was not conveyed in public comments previously submitted. A similar opportunity would be equally valuable before finalizing Performance Criteria Area Four.

Of the seven criteria included in Performance Area 4, two specific ones illustrate the concerns we have with the current proposed revisions:

**I. Criterion One: Board Governance**

- a. LSC's additional proposed indicators and areas of inquiry should be used as guidance that reflect best practices, not as inclusive criteria that must be met in order to achieve effective board governance.*

There appears to be general consensus on major areas that should be considered when evaluating the effectiveness of board governance. However, even among the experts cited in LSC's resources, there are differences of opinion on the best methods to use. Further, what may be a best practice today can change or evolve as more research and information becomes available.

One example of how reliable sources cited by LSC as best practices may differ regarding effective board governance can be seen by reviewing their proposed methods to assess board composition. A number of resources cited by LSC, including Board Source, recommend the use of a Board Composition Matrix to assess board composition.

<https://boardsource.org/fundamental-topics-of-nonprofit-board-service/composition-recruitment/board-recruitment/envision-ideal-board/> However, another source cited by LSC, the National Council of Nonprofits (NCN), discusses in one of its articles "Finding the Right Board Members for Your Nonprofit" <https://www.councilofnonprofits.org/tools-resources/finding-the-right-board-members-your-nonprofit> that use of the board matrix is not the only option, stating that there are a number of valid methods that can be used. The article cites a piece by Blue Avocado that recommends discarding the use of the board

matrix, highlighting three failures of board matrix approaches in “Ditch your board composition matrix”

<http://www.blueavocado.org/content/ditch-your-board-composition-matrix>

The NCN article states:

Start with an assessment of the skills, experience, and expertise of your existing board so you can identify gaps. Whether using a full self-assessment of the board (McKinsey) or a short form “matrix,” beware of limiting your thinking. Ditch your board composition matrix (Blue Avocado) - See more at:

<https://www.councilofnonprofits.org/tools-resources/finding-the-right-board-members-your-nonprofit#sthash.Z7sprKos.dpuf>

This is just one illustration of how, even among acknowledged expert resources, there are differing opinions and a range of approaches on how to ensure effective board governance. Therefore, even if a grantee is not following a best practice or best practices recommended by one of the cited sources, the board governance in place may still be very effective. A grantee should not be bound to use a particular method or methods of inquiry recommended in LSC’s revised Performance Criterion One, but rather should consult the recommendations and use their best judgement for deciding which practices are most appropriate to implement for their specific program. Nor should grantees be required to implement a whole set of different practices if a grantee’s board is functioning effectively in overseeing program operations.

*b. Programs that receive funding from LSC are unique in the non-profit world because the LSC Act and regulation 45 CFR 1607 mandate board composition and appointment methods. Grantees face unique challenges in recruiting and retaining effective board members and many of the best practices recommended by LSC cannot be readily adopted by grantee boards.*

i. Board composition and appointment mandates

The board must be composed of at least sixty percent attorneys who are members of the bar of a State where the grantee is providing assistance and at least one-third of the board must consist of eligible clients, who may also be representatives of associations or organizations of eligible clients.<sup>2</sup> Further, LSC’s regulation regarding governing bodies provides that: “A majority of the members of the governing body shall be attorney members appointed by the governing body (is) of one or more State, county or municipal bar associations, the membership of which represents a majority of attorneys practicing law in the localities in which the recipient provides legal assistance.”<sup>3</sup>

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<sup>2</sup> LSC Act 1007 (c), 45 CFR 1607

<sup>3</sup> 45 CFR 1607.3(b)(1)

ii. Constraints on board composition and recruitment

These restrictions significantly limit the control a grantee has over board composition and recruitment, raising a myriad of challenges, such as member recruitment, bringing members on board with specialized talent or skills, and promotion of diversity among members. Over ninety-three percent of a grantee's board composition is dictated by statute and cannot be changed. Many of the resources cited by LSC did not develop their recommendations with these restrictions in mind. For example, a new LSC proposed area of inquiry states:

Is the board either composed of an appropriate mix of members that are sufficiently expert in areas applicable to the program's operations and achievement of overall goals related to the mission— e.g. financial oversight, fundraising, community engagement – or has it taken steps to ensure that such expertise is available to the board on a consistent basis? Performance Criteria Four, Criterion 1 Board Governance, Page 1

Is there a separate Finance or Audit Committee? Is there a separate fundraising committee? Id at 5.

These areas of inquiry are appropriate and should be seriously considered, but the ability of a LSC-funded grantee to achieve a mix of members with different areas of expertise is severely limited by LSC's regulation regarding governing bodies. The regulatory requirements present even greater challenges for smaller programs and/or programs that cover large remote or rural areas. The number of attorneys available and willing to serve on a grantee's board and who bring diversity in areas of expertise is much more limited for grantees who cover large areas or an entire state of mostly rural areas.

Some grantees are currently having difficulty recruiting enough board members to fill current vacancies. Once recruited, full engagement in all aspects of board governance can be a struggle when there are few if any alternatives for replacing board members. The availability of individuals with skill sets in areas such as finance or fundraising can also be particularly limited. The long distances that board members must travel to participate on boards of programs that cover large rural service areas present additional obstacles for grantees to recruit and retain board members.

iii. Special responsibilities: One third of the board must be composed of LSC-eligible client members

Client members bring unique skills and backgrounds. However, grantees must use additional and different strategies from those recommended in the revised Grant Performance Criteria to ensure client board member engagement and retention. For example, grantees must address transportation and childcare needs of client board members so they can attend board meetings. Specialized training must be provided to ensure that client members are effectively engaged. Performance Criterion One does not provide tools or resources to assist in addressing effective client board member participation, best practices, or how to incorporate and balance these additional demands as part of board governance.

- iv. Because of the wide variation in grantees' circumstances, such as staff size, geographic location, state and local support, and community needs, grantees can have different responses to proposed areas of inquiry, but equally effective board governance.

How will LSC ensure appropriate and equitable use of the evaluation criteria when the answers to the proposed areas of inquiry are subjective and will vary between grantees? For example, areas of proposed inquiry include: "Does the board impose term limits on board membership? If so, what are the term limits? If the board imposes term limits, how does the organization avoid the loss of the experience and expertise of valued directors?" Performance Criteria Four, Criterion 1 Board Governance, Page 3.

These areas of inquiry illustrate that grantees and their boards should consider whether there should be term limits, but a board does not necessarily have to have term limits, nor is there a set time period for term limits. Because there is not a set answer to these areas of inquiry, LSC and its grantees have the necessary flexibility to gauge performance based on the specific circumstances of each grantee and its client community. However, we are concerned that, since there is not one correct response, LSC's proposed additional areas of inquiry could be used in the oversight process to generate subjective recommendations from LSC staff with which grantees must comply, even if they have reasonable grounds to disagree.

- v. Inadequate resources require grantees to balance competing needs.

As previously indicated, grantees "...constantly face tradeoffs in which an increased commitment in one Performance Area may mean a lessening of emphasis in another." For many programs incorporating each best practice identified by LSC in the revised Criterion One on board governance would, at the very least, be very time consuming and require significant use of resources at the expense of not having the resources to meet criteria in the other three Performance Criteria Areas.

LSC's new proposed indicators and proposed areas of inquiry in Criterion One provide valuable tools for evaluating the effectiveness of board governance. However, taken as a whole, these should be aspirational. Under the best of circumstances, few programs could meet all of the criteria. Absent sizeable increases in funding, using resources to meet all of the new proposed criteria would significantly decrease the resources needed to adequately meet the remaining three Performance Criteria Areas and decrease the level of services actually provided to clients.

Grantees need leeway to assess and determine which of LSC's additional proposed criteria should be incorporated to increase the grantee board's effectiveness, what impact this will have on grantees' ability to provide quality legal services to its client community, and how best to implement these changes.

Grantees will certainly benefit from such information as LSC would provide on best practices that can be effectively used to meet the unique barriers they face in recruiting and

developing effective boards. However, we do not want to see program management unreasonably required to document that they cannot meet numerous best practices for valid reasons that will be added to Criterion One or penalized with a Tier One recommendation.

These measures will not change the constraints grantees face or increase the available pool of board members needed to meet many of the areas LSC proposes adding to Criterion One. NLADA recommends that LSC explore ways to provide effective assistance to grantees on best practices that can be used to improve board performance given the unique statutory constraints and difficult circumstances that directors of smaller programs and programs that cover large remote and/ rural areas face. For example, LSC could identify grantees who have successfully developed strategies that have improved board effectiveness and and/or create and facilitate a peer to peer network to share these strategies.

## **II. Performance Criterion Four: Financial Administration**

A number of LSC's proposed revisions to Criterion Four encompass many proposed indicators and areas of inquiry that are already covered and required by LSC's Accounting Guide. Our concern is that these new proposed areas of inquiry create duplicative requirements for grantees that may be evaluated by LSC multiple times within a limited time period impeding, rather than ensuring, the provision of economical and effective delivery of legal services.

Fiscal administration procedures already in place include:

Grantees must, as a condition of receiving a basic field grant from LSC, agree to comply with the provisions in LSC's Accounting Guide and LSC's Audit Guide for Recipients and Auditors.

Grantees are required to conduct and submit an annual audit that complies with the requirements of LSC's Audit Guide for Recipients and Auditors by an independent auditor and the audit must be submitted to LSC's Office of Inspector General for review.

The Office of Compliance and Enforcement during its compliance reviews of grantees conducts a thorough inquiry and review of a grantee's fiscal compliance and makes identical or virtually identical inquiries into the majority of new areas of the proposed areas LSC seeks to add.

Once a grantee establishes procedures for sound fiscal administration that comply with LSC's requirements, using grantees' and LSC's resources to repeatedly confirm that the same requisite policies are in place is not necessary. A number of these areas of inquiry do not have to be repeatedly reviewed by LSC (for example Whistleblower and Conflicts of Interest Policies).

If the detailed areas of fiscal inquiry proposed by LSC are to be added to LSC's grant application process, a grantee could be evaluated using the same criteria and be required to

supply the same information and documents to LSC three times in a single year: during an OPP Grantee Quality Visit, during an OCE compliance visit,<sup>4</sup> and in the grantee's grant application. This would be burdensome for grantees and not an efficient or effective use of LSC's and grantees' resources.

**III. We support many of the additional responses received from the field on specific proposed areas of inquiry.**

For example:

1. Criterion 1. Board Governance: Proposed Area of Inquiry. "Evidence of Examination"

Grantees have raised concerns that a board should be judged by its effectiveness, not by whether there is evidence that the board has examined its size. The question is whether the board's size facilitates its effectiveness, particularly in light of the unique statutory constraints.

2. Criterion 1. Board Governance: Proposed Area of Inquiry. "Did the Board adopt a policy for handling employee and client complaints?"

Grantees expressed concerns regarding the proposed area of inquiry on whether a board has adopted a policy for handling employee and client complaints. Grantees were concerned that this could be misinterpreted and result in policies that would encourage the board to become overly involved in employee grievances and encouraged to extend the board's involvement in client complaints beyond the requirements in 45 CFR 1621. There should be a distinction between employee grievances regarding personnel decisions versus whistleblower policies and procedures for reporting financial impropriety or misuse of resources. The reference to the employees' policies in the IRS publication cited indicates that such policies are sometimes referred to as whistleblower policies.<sup>5</sup> The area of inquiry immediately after the section appropriately inquires about policies for reporting fiscal mismanagement or misuse of resources and already covers employee complaints. For client complaints there should be a reference to the regulation, 45 CFR 1621.

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<sup>4</sup> It is not usual for LSC to conduct both an OPP PQV and an OCE compliance visit within the same year. In fact, programs have undergone a third visit by Office of Inspector General within a one or two year period.

<sup>5</sup> The Internal Revenue Service encourages the board of directors to adopt an effective policy for handling employee complaints and to establish procedures for employees to report in confidence any suspected financial impropriety or misuse of the charity's resources. Such policies are sometimes referred to as whistleblower policies. [https://www.irs.gov/pub/irs-tege/governance\\_practices.pdf](https://www.irs.gov/pub/irs-tege/governance_practices.pdf)



3. Criterion One: Proposed Area of Inquiry. “Is there a charter for each committee?”

Grantees have expressed that having a charter for every committee is excessive. The criterion should be more general requiring that responsibilities of committees should be clearly defined, either by being set out by charter or in some other written form.

4. Criterion One: Board Governance: Proposed Area of Inquiry. “Do board meetings include an executive session without any staff (including the executive director)?”

The proposed area of inquiry seems to require that that boards of directors should have an executive session at every meeting. It is not always necessary to have an executive session at every board meeting.

#### **IV. Management Information Exchange (MIE) comments**

NLADA supports and incorporates the comments submitted by MIE. MIE is a nonprofit organization that has played a strong role supporting leaders, managers, supervisors, administrators, and fundraisers in legal aid programs. The organization’s mission is to promote excellence in management to ensure high quality advocacy on behalf of low-income people, which includes advancing best practices and innovation in leadership, management, supervision and fundraising. MIE’s comments are based on widespread experience working directly with legal services programs specifically on the areas of program management addressed in Performance Criteria Area Four.

#### **Conclusion:**

NLADA reiterates its recommendation, made to LSC while serving on the advisory committee, that the proposed revisions to the areas of inquiry should be memorialized in a separate document to reference for best practices, and not used as an inclusive list of criteria that a grantee must meet to be considered effective.

In the alternative, if LSC does not adopt this recommendation, NLADA recommends that, if a grantee’s board generally meets Performance Criteria Area Four and is operating effectively, LSC should only require corrective action if a grantee is not meeting a legal requirement (for example information required to be disclosed on the Internal Revenue Service Form 990 or statutory requirement).

For all of the reasons discussed above, we strongly urge LSC not to incorporate these extensive additions into the grant application process. The use of program resources to respond to these extensive areas of inquiry would significantly increase the staff time necessary to complete the application, reducing already inadequate resources that grantees need to meet the other Performance Criteria Areas. This would impede, rather than promote, the effective delivery of legal services to people living at or near the poverty level.

NLADA understands that LSC is not required to seek public comment before revising the Performance Criteria, and extends our appreciation for the time and effort LSC has expended in proposing revisions and seeking and considering the input of NLADA, grantees and other stakeholders.

Sincerely,

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