



Sent via e-mail to: LSCGrantAssurances@lsc.gov

May 16, 2016

Reginald J. Haley
Office of Program Performance
Legal Services Corporation
3333 K St. N.W.
Washington, DC 20007

RE: 2017 Grant Assurances - Comments Concerning LSC's Proposed Revisions to the 2017 Grant Assurances. (81 FR 19640-19641) April 5, 2016

Dear Mr. Haley,

On behalf of the National Legal Aid and Defender Association (NLADA), we want to thank the Legal Services Corporation (LSC) for the opportunity to comment on the proposed revisions to the Grant Assurances setting out the duties and obligations of your grant recipients for FY 2017.

These comments are submitted on behalf of NLADA by its Civil Policy Group, the elected representative body that establishes policy for the NLADA Civil Legal Services Division, and by its Regulations and Policy Committee. NLADA offers the following comments to the revision in Paragraph 7 in the Notice of Proposed Revisions for the LSC Grant Assurances for Calendar Year 2017 Funding, published on April 5, 2016 in the Federal Register.

We have received a number of comments from the field and other stakeholders concerning the proposed revision to paragraph 7 requiring programs to receive prior written approval from LSC before instituting a "significant change in the legal services delivery system". We urge you not to include this condition for FY 2017 grants. If you choose to include such a provision, the scope and intent needs significant clarification.

Areas of Concern

Our most serious issues with paragraph 7 include:

1. The language “significant change in a service delivery system” lacks clarity and is subject to many different interpretations. The term “significant change” is a subjective standard, requiring grantees to make judgment calls that could imperil their grants. Similarly, “service delivery system” is not defined and there is no guidance for grantees as to what constitutes a decision that would affect a “system” of service delivery.
2. The provision constitutes a significant intrusion into the ability of a grantee and its state justice system partners to make decisions that are dictated by local needs and concerns, thus undermining efficient and effective programmatic operations. Depending on how the provision is interpreted, it could have a major impact on grantees’ ability to pursue a variety of funding opportunities and potentially undermine their relationships with critical partners within a state’s civil justice system.
3. The approval requirement will thwart grantees’ capacity to develop and increase other non-Corporation resources, such as the significant and expanding federal funding opportunities made available to legal services programs through the White House Interagency Legal Aid Roundtable (WH-LAIR). Grantees’ ability to rapidly develop and submit competitive requests throughout the year will be appreciably diminished if grantees must, at the same time, obtain approval from LSC each time they apply for or accept non-LSC federal funding.
4. The grant assurance requirements should support, not hinder, grantees’ capacity to meet the Competitive Bidding for Grants and Contracts selection criteria in 45 C.F.R. 1634.9, including LSC’s Performance Criteria.
5. The provision is not necessary, as LSC already receives extensive information about grantees’ delivery systems and changes to the systems annually. The potential costs to even more frequent reporting far outweigh potential benefits to the corporation, grantees and their client communities. The additional approval requirement further complicates a grantee’s ability to effectively and efficiently respond to community needs, potentially hindering their ability to leverage additional resources and provide new types of services when these needs change.

Background

As you are aware, the landscape for the provision of civil legal services to individuals living in poverty has become increasingly more complex over the last decade. To maximize their effectiveness, LSC grantees must constantly shift strategies in response to rapid changes in

funding sources, technological advancements and needs within the client communities they serve.

LSC funding nationally accounts for roughly 39.6% of the overall resources for LSC-funded legal aid programs. In many states, the percentage of LSC funding is significantly below the national average. Grantees are continually faced with the need to administer non-LSC grants, each with their own specific grant conditions and requirements for accounting and program administration. It is not unusual for grantees to have anywhere from 25 to 60 separate funding sources.

In addition to the complex funding matrix, grantees' delivery structures vary dramatically. The size, location, resource levels and representation models vary greatly between grantees within a state and from state to state. For example, some programs cover an entire state with 10 or more regional offices spread out between more remote rural areas, more populated areas and cities. In other states there are multiple LSC-funded programs with sizeable variations in levels of funding, number of staff, staff composition, and geographic areas of coverage.

Discussion

- I. *The language "significant change in a service delivery system" lacks clarity and is subject to many different interpretations. The term "significant change" is a subjective standard, requiring grantees to make judgment calls that could imperil their grants. Similarly, "service delivery system" is not defined and there is no guidance for grantees as to what constitutes a decision that would affect a "system" of service delivery.*

As stated above, we urge you not to include this proposed grant condition among the many other requirements already attached to LSC grants. If included, the current language needs significant clarification.

The term "service delivery system" could cover a broad array of ways a grantee delivers services. The term raises numerous questions as to what LSC considers a service delivery system.

For example, would it include:

- the substantive legal areas covered by the program;

- the provision of services to particular types of client groups, for example veterans or senior citizens;
- the technology used by the program to deliver services;
- the organizational or staffing structure;
- how a program delivers services, such as moving to a greater dependency on supporting assisted self-help programs; or a decision to employ a larger percentage of paralegal personnel;
- the priorities set by a grantee’s board of directors;
- grant seeking strategies that affect the delivery of services in place at the time an LSC grant is awarded?

Likewise, the current provision requires grantees to make nearly impossible decisions of materiality in determining which delivery decisions amount to “significant” changes under the terms of the grant condition. For example, in a program with ten attorneys, the loss of one attorney or a grant supporting several staff could necessarily facilitate one or more of the changes listed above. On the other hand, for a large program with 50 attorneys, the loss of one staff attorney, or a grant funding one or two attorneys, would be much less significant and might not result in a “significant” change.

We are also concerned about the many potential circumstances where a grantee might find itself needing to obtain approval for changes in its service delivery system that are beyond the grantee’s control? The chances of such situations occurring are numerous.

For example, a grantee might be forced to close intake in one or more offices, or in a substantive area, due to staff shortages, short and long-term illnesses, or to provide for parental leave. A site or sites where services, such as intake or pro bono clinics, are provided may no longer be available due to increased overhead or because leased or donated space is no longer available. Staffing changes might result in changes in service delivery— for instance when several staff with expertise in an area leave within a short period of time. A program might also lose funding targeted to cover a specific type of representation, such as domestic violence, foreclosure, or older adults’ advocacy.

As you know, resource levels from large funders, such as LSC, IOLTA, and state legislative sources fluctuate on an annual basis. Grantees must constantly respond to these frequent shifts in resources, funding requirements, as well as changes in substantive areas funders are willing to support. As a result, programs are often forced to eliminate or shift resources and services in a fashion that could be deemed a significant delivery system change.

These situations are representative of the kind of questions that this grant assurance might raise. Grantees are often forced to make significant changes in response to forces beyond their direct control. These circumstances already stretch a grantee's existing resources, and the proposed grant assurance can only add a layer of uncertainty, and additional costs in time and funding, to an already complex mix. It could also significantly delay a grantee from making needed changes in staffing, services, office space needs or other necessary responses to changed circumstances during the term of an LSC grant.

Some of these potential questions and costs the assurance raises in the field include:

- What kind of documentation will LSC require?
- What criteria will LSC use in determining whether to approve the change?
- How will the grantee know how detailed their request for approval should be?
- How much time will LSC need to approve the proposed change?
(LSC recently indicated that prior approval of a subgrant takes 10 – 20 hours)
- How many requests does LSC anticipate receiving annually?
- Does LSC have the resources to approve these changes on a timely basis?
(Currently, LSC is proposing that 45 days or more, with no limitation, is a reasonable time frame for LSC to approve a subgrant.)
- What process will be followed if LSC does not approve a proposed change?
- What type of guidance will LSC provide to the grantee to prepare a proposal that will be approved?

II. *The provision constitutes a significant intrusion into the ability of a grantee and its state justice system partners to make decisions that are dictated by local needs and concerns, thus undermining efficient and effective programmatic operations. Depending on how the provision is interpreted, it could have a major impact on grantees' ability to pursue a variety of funding opportunities and potentially undermine their relationships with critical partners within a state's civil justice system.*

As drafted, this proposed grant assurance does not limit its scope to LSC-funded services. Would seeking and implementing non-LSC funding resources that enable a program to expand the type, amount, or substance of the assistance it provides be considered a significant change in service delivery? If so, the requirement to have prior written approval from LSC to apply for or accept funding from other funding sources could create significant uncertainty in the field.

LSC grantees receive funding from numerous sources, in direct response to LSC's encouragement of innovation and entrepreneurship. As pointed out earlier, grantees' success in growing their portfolios of funding has led LSC to be a minority funder in a number of jurisdictions across the United States. This proposed assurance raises significant questions about LSC's role as a partner in such a diverse system of funding. LSC has many other means of access to essential records of grantees to ensure that federal dollars are spent effectively and in a compliant manner. To require prior approval by LSC of all delivery decisions in a given program/jurisdiction, regardless of funding source, could result in serious harm without providing LSC with significantly more information than it already collects annually.

Does a grantee need prior approval to submit a grant application? If the grantee can apply, but must have LSC's approval to accept the grant, would that not discourage grantees from maximizing their fundraising efforts? Such a requirement could negatively impact a grantee's ability to be considered by a potential funder or partners involved in a particular grant application in the future.

State stakeholders are becoming increasingly involved in planning and supporting an integrated network of legal services providers designed to meet the legal needs of low-income (and in some cases moderate) income individuals. LSC, the Conferences of Chief Justices and State Court Administrators, the Public Welfare Foundation and the Kresge Foundation have all been strongly encouraging states to develop strategic plans to significantly alter their delivery systems to meet the goals of the Justice for All initiative, driven by a view of providing access to some kind of effective assistance to 100% of people in need. Access to Justice Commissions (ATJ's), IOLTA programs and other state level funders have been strongly encouraged to engage in this effort. How is it effective or efficient for grantees, an essential component of all of the initiatives, to obtain LSC's consent to implement the recommendations of such entities, particularly where LSC is a minority funder that apparently does not plan to involve other stakeholders in the approval process?

- III. *The approval requirement will thwart grantees' capacity to develop and increase other resources such as the significant and expanding federal funding opportunities made available to legal services programs through the White House Interagency Legal Aid Roundtable. (WH-LAIR).*

The WH-LAIR program, just one example of many new resources available, is constantly seeking and developing new federal grant opportunities for grantees from over 21 cooperating federal agencies. Generally these federal grant applications are due within a 60-day time frame and many require legal services programs to partner with a number of additional organizations or providers. Grantees need the flexibility to be able to timely respond to these opportunities with

competitive applications throughout the year. This federal funding constitutes a critical and increasing source of funding for LSC programs. Last year in 2015, 17.2% of LSC grantees funding, or \$103 million, came from non-LSC federal funding, an increase from \$88 million in 2014.

- IV. *The grant assurance requirements should support not hinder grantees' capacity to meet the Competitive Bidding for Grants and Contracts selection criteria in 45 C.F.R. 1634.9.*

The selection criteria in 45 C.F.R. 1634.9 (2) includes:

“The quality, feasibility and cost-effectiveness of the applicant's legal services delivery and delivery approach in relation to the Corporation's Performance Criteria and the American Bar Association's Standards for Providers of Civil Legal Services to the Poor, as evidenced by, among other things, the applicant's experience with the delivery of the type of legal assistance contemplated under the proposal “¹

LSC's primary goal, which reflects its fundamental mission, is “to maximize the availability, quality, and effectiveness of the civil legal services that its grantees provide to eligible low-income individuals.” LSC Strategic Plan 2012 – 2016. ² LSC uses its Performance Criteria to use as a standard in measuring the effectiveness of grantees in delivering high quality and effective services. The relevant criteria states:

“driven by a vision that a highly effective program is, within the limits of its resources, continually engaged in a dynamic process involving planning, delineating objectives, working to achieve those objectives, assessing results, and incorporating the resultant experience and learning into plans for future work. The most effective programs are constantly in processes of motion and change and are innovative and experimental. They continually adjust their approaches and strategies in response to new circumstances and ongoing judgments about which legal needs are most critical, which avenues do and do not work, what resources are available, what to do about changed laws or court precedent, and many other factors. “³

The prior approval requirement for any significant change in service delivery system would impede a recipient's ability to be dynamic, innovative and experimental. Furthermore, LSC acknowledges in its Performance Criteria that grantees and their boards are in the best position to determine and respond to community needs.

¹ <http://www.lsc.gov/media-center/publications/lsc-performance-criteria>

² http://www.lsc.gov/sites/default/files/LSC/lscgov4/LSC_Strategic_Plan_2012-2016--Adopted_Oct_2012.pdf

³ <http://www.lsc.gov/media-center/publications/lsc-performance-criteria>

The criteria “...make no effort to predetermine which legal needs or types of cases are most important, what kinds or levels of service should be provided, or how specific cases should be pursued. Such categorical and quantitative absolutes are not possible or helpful, given the enormous variety in circumstances from community to community. Similarly, there is no strict checklist of specific processes, systems or factors, the presence or absence of which define whether or not a program is effective.”⁴

The impact of the proposed new assurance appears to usurp this process by adding additional burdens on recipients to seek approval from LSC, interjecting its own judgment for any change it considers significant in a program’s delivery system. Such a process flies in the face of the guidelines for effective, dynamic planning in the Performance Criteria. These efforts in the past have led to significant improvements in the delivery of civil legal assistance to low-income people in the United States. The potential for the assurance to undercut that success is significant.

The 45 C.F.R. 1634.9 regulation criteria also includes in subsection 6:

“The applicant's knowledge of the various components of the legal services delivery system in the State and its willingness to coordinate with the various components as appropriate to assure the availability of a full range of legal assistance, including:

(i) its capacity to cooperate with State and local bar associations, private attorneys and pro bono programs to increase the involvement of private attorneys in the delivery of legal assistance and the availability of pro bono legal services to eligible clients; and

(ii) its knowledge of and willingness to cooperate with other legal services providers, community groups, public interest organizations and human services providers in the service area”

As indicated in the previous section II above, the new grant assurance provision in paragraph 7 constitutes a significant intrusion into the ability of a grantee and its state justice system partners to make decisions that are dictated by local needs and concerns, thus undermining efficient and effective programmatic operations.

The regulatory criteria also includes subsection 7 – “the applicant's capacity to develop and increase non-Corporation resources”.

⁴ <http://www.lsc.gov/media-center/publications/lsc-performance-criteria>

- V. *The provision is not necessary, as LSC already receives extensive information about grantees' delivery systems and any changes to that system annually. The potential costs to even more frequent reporting far outweigh potential benefits to the corporation, grantees and their client communities.*

LSC strongly encourages programs to be dynamic, innovative and entrepreneurial in developing new resources and partnerships. Such initiative will often result in a change in a grantee's service delivery system. As indicated above, LSC receives extensive information about a grantee's service delivery system in LSC grant applications and annual grant renewal requests. LSC has broad authority to impose sanctions if a grantees' activity does not comply with LSC statutes, regulations, policies or fiscal requirements. If there is further information LSC needs about a program's service delivery system or changes in the system these questions can certainly be added to the grant application or grant renewal application.

Again, we appreciate the opportunity to provide comments on the proposed assurances. Please do not hesitate to contact us if we can provide further information.

Sincerely,

Anthony Young, Chair, Civil Policy Group (CPG)
Silvia Argueta, Chair, CPG Regulations and Policies Committee
Robin Murphy, Chief Counsel for Civil Programs
National Legal Aid and Defender Association