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**RE: Comments Concerning Proposed Revisions to 45 CFR Part 1610 and 1630, Use of Non-LSC Funds, Transfers of LSC Funds, Program Integrity; Cost Standards and Procedures (84 Fed. Reg. 39787-39793 (August 12, 2019))**

Dear Attorney Freedman,

This letter is submitted in response to LSC's request for comments on proposed revisions to the regulations on the use of non-LSC funds, transfers of LSC funds, program integrity, and cost standards and procedures, located at 45 C.F.R. § 1610 and 45 C.F.R. § 1630. The comments are submitted on behalf of the National Legal Aid & Defender Association (NLADA).

NLADA applauds LSC for the extensive work on these sections as LSC attempts to improve clarity without causing any substantive changes to the regulations or their enforcement. NLADA has comments on where we believe clarity could be further improved as well as one comment on where we believe the proposed revision of §1630.16 results in an unintentional, but significant substantive change. Beginning with our concerns related to the changes to §1630.16, our comments then go through each section of §1610 separately.

## **I. COMMENTS ABOUT A POTENTIAL SUBSTANTIVE CHANGE**

### **PROPOSED CHANGES TO §1630.16**

NLADA's biggest concerns about these revisions relate to the proposed changes to §1630.16, and these concerns go to issues of both clarity and substance. The current §1630.16 reads as follows:

#### **§ 1630.16 Applicability to non-LSC funds.**

- (a) No costs attributable to a purpose prohibited by the LSC Act, as defined by 45 CFR 1610.2(a), may be charged to private funds, except for tribal funds used for the specific purposes for which they were provided.

- (b) No cost attributable to an activity prohibited by or inconsistent with Pub. L. 103-134, title V, sec. 504, as defined by 45 CFR 1610.2(b), may be charged to non-LSC funds, except for tribal funds used for the specific purposes for which they were provided.
- (c) LSC may recover from a recipient's LSC funds an amount not to exceed the amount improperly charged to non-LSC funds. A decision to recover under this paragraph is subject to the review and appeal procedures of §§ 1630.11 and 1630.12.

NLADA members who are LSC recipients have found this current version of §1630.16 to be clear and straightforward in its meaning. Essentially, subsection (a) outlines a general rule that non-LSC private funds may not be used for “a purpose prohibited by the LSC Act,” and subsection (b) outlines a general rule that no funds, regardless of their source, may be used for “an activity prohibited by or inconsistent with” section 504. Both of these sections cite back to the current §1610.2, which lists out all the activities that fit into the definitions listed in subsections (a) and (b) of §1630.16.

Finally, subsection (c) notes that LSC may recover LSC funds in an amount not to exceed those that were improperly charged to non-LSC funds. Although not explicitly defined, it is implied that, here, “improperly charged” means funds that were charged in violation of either subsection (a) or (b).

LSC has proposed a change to this section that would read as follows:

**§ 1630.16 Applicability to non-LSC funds.**

- (a) No cost may be charged to non-LSC funds in violation of §§ 1610.3 or 1610.4 of this chapter.
- (b) LSC may recover from a recipient’s LSC funds an amount not to exceed the amount improperly charged to non-LSC funds. The review and appeal procedures of §§ 1630.11 and 1630.12 govern any decision by LSC to recover funds under this paragraph.

On first glance, this new section seems much simpler. For one thing, it contains fewer than half as many words. But for what LSC gained in brevity, it has lost in clarity. More troubling, if we are assuming that, as the NPRM states, LSC’s intent is still to avoid substantive changes, the proposed revisions to §1630.16 undermine a central intent of the revision.

**a. On the Issue of Clarity**

To understand the full meaning of the current §1630.16, one must read §1630.16 and §1610.2. Under the proposed revision, §1630.16 first directs readers to §1610.3, which lists out 7 “requirements,” and then to §1610.4, which lists out the different types of restrictions and which funds they limit. After that, the reader has to figure out that these restrictions are further defined in §1610.2 and THEN s/he is put in the same position as s/he was in after simply reading the current §1630.16, i.e., pointed to §1610.2 to read a list of restricted activities.

More important than the increased need for cross-referencing, however, is that **the new language appears to give LSC new actionable power over a recipient's use of non-LSC public funds.**

Going back to the current §1630.16, there is no mention of public funds whatsoever when discussing costs attributed to a “purpose prohibited by the LSC Act.” This phrasing has since been replaced with the term “Standard Restrictions.” When we go through all the different sections to discern the meaning of the proposed §1630.16, we see that “Standard Restrictions” apply to, among other things, “any unauthorized use of public funds.” The definition of authorized use of public funds has not changed. Similarly, the rule that public funds can only be used within the purpose for which they were provided if they are to be spent on activities listed as “standard restrictions” is also not new.

**b. On the Issue of Substance**

What is new is that the proposed §1630.16 appears to allow LSC to recoup LSC funds in the event that public funds were used in an unauthorized manner for activities that are included in the definition of “standard restrictions.”

To be clear, public funds can be used to fund such activities. The only requirement is that, when doing so, recipients can only use those public funds within the purpose(s) for which those funds were provided. In the past, any questions about such intended purposes or “unauthorized use” would have LSC refer the issue to a recipient's public funder. A determination of what was the true intent of the public funder would, appropriately, rest with the provider of such funds. Further, any decision of whether to recoup funds in the event that they were used in violation of a public funder's intent would also rest with the public funder.

The new language of §1630.16 appears to give this responsibility to LSC, a significant change. It puts LSC in an inappropriate position to determine what states, municipalities, and federal agencies really intend when making grants to recipients. Additionally, it creates a risk that a recipient could, in certain situations, receive a double penalty, one from LSC and one from the public funder. LSC enforcement should be about safeguarding the use and integrity of LSC funds, not unnecessarily punitive actions.

LSC should retain the structure of the existing §1630.16 along with its current meaning. First, the old structure had greater clarity. Second, the original intent represents a more sound policy. Finally, this revision has explicitly declared an intention to make only non-substantive changes. Significant changes should be avoided when they were so clearly not intended.

### **c. NLADA's Proposal**

NLADA would propose a new §1630.16 that would read, in essence, as follows:

#### **§ 1630.16 Applicability to non-LSC funds.**

- (a) No costs attributable to any Standard Restrictions, as defined by 45 CFR 1610.2(d)(2), may be charged to private funds, except for tribal funds used within the purpose for which they were provided.
- (b) No costs attributable to Extended Restrictions as defined by 45 CFR 1610.2(d)(1), may be charged to non-LSC funds, except for tribal funds used within the purpose for which they were provided.
- (c) No costs charged in violation of the requirements listed in 45 CFR 1610.3 may be charged to non-LSC funds, except for tribal funds used within the purpose for which they were provided.
- (d) Costs charged in violation of paragraphs (a) through (c) of this section will be deemed improperly charged.
- (e) LSC may recover from a recipient's LSC funds an amount not to exceed the amount improperly charged to non-LSC funds. The review and appeal procedures of §§ 1630.11 and 1630.12 govern any decision by LSC to recover funds under this paragraph.

This proposed version mirrors the structure of the current §1630.16, but replaces the old terms and language with the proposed new terms and language. It also adds additional subsections (c) and (d). Subsection (c) accounts for the fact that some requirements have been removed from §1610.2 and listed separately in §1610.3. The addition of subsection (d) explicitly defines "improperly charged" to make it clear what the regulation is referencing when discussing LSC's ability to recover LSC funds from a recipient. Written as such, §1630.16 would reduce the amount of cross-referencing required, provide additional clarification, and also maintain its original meaning. NLADA would urge LSC to consider revising §1630.16 accordingly or in another similar manner.

## **II. COMMENTS ABOUT NON-SUBSTANTIVE CHANGES**

The following comments address our thoughts and concerns as they relate to the non-substantive changes. Comments are organized and addressed in the order of the proposed revised section numbers.

### **§ 1610.1 Purpose.**

The proposed changes to this section are limited edits that make only minor non-substantive changes. NLADA believes these edits improve clarity, and we have no concerns as it relates to the revisions in this section.

## **§ 1610.2 Definitions.**

This section begins with a definition of “Use of Funds,” which then contains subsections that define “Authorized” and “Unauthorized” uses. The definition of “Authorized Use” is currently located in §1610.4. This new definition is an improvement in that it is written with greater brevity and does not lose any clarity or meaning.

NLADA does have a concern about subsections (i) through (iii), which give examples of what constitutes an “Authorized Use” of funds. First, a list that is not meant to be exhaustive, but illustrative, should be explicit that it is in fact not exhaustive. Second, this list is not particularly helpful in understanding the different kinds of limitations that could be put on funds. The examples include situations where the funds may be granted for “limited purposes,” “general purposes,” or “any purposes,” but these terms are not defined nor are they self-evident. It’s unclear why serving only domestic violence victims, regardless of their financial resources, would be a limited purpose while serving only those who earn less than a certain amount, regardless of their legal topic, would be a general purpose. It’s also unclear what, if any, conclusions we are supposed to draw from these examples.

Subsection (c) of this section defines the different types of non-LSC funds. Private funds are listed first, but are defined as “funds that are derived from any source other than LSC or the other categories of non-LSC funds in this section.” Given that they are defined in contrast to the other types of non-LSC funds, it could improve clarity by listing the definition for private funds last instead of first.

Subsection (d) lists out the different types of restrictions, Extended, Standard, and Limited. It stuck out to NLADA that the financial eligibility requirements of §1611 (applicable only to LSC funds) were not listed in this section or anywhere else in this proposed version of §1610. As the §1610 revision attempts to list out any and all restrictions, it seemed like a mistake to not include the restrictions included in §1611. Furthermore, financial eligibility was addressed in the prior version of §1610, then located in §1610.4(d), which stated:

A recipient may use non-LSC funds to provide legal assistance to an individual who is not financially eligible for services under part §1611 of this chapter, provided that the funds are used for the specific purposes for which those funds were provided and are not used for any activity prohibited by the LSC Act or prohibited by or inconsistent with Section 504.

NLADA is not concerned that an omission of the restrictions contained in §1611 will result in any substantive change, but their omission does not appear to increase clarity. LSC recipients are in fact restricted from using LSC funds to serve those who do not meet §1611 financial eligibility requirements, and this restriction does not apply to any non-LSC funds. It is unclear why, given the exhaustive list in the other categories, that the §1611 restriction is not listed under Limited Restrictions.

## **§ 1610.3 Requirements that apply to all funds.**

The current §1610.3 is renumbered to §1610.4 and revised. LSC’s proposed changes involve a brand new §1610.3, titled, “Requirements that apply to all funds.” On its face, it makes

sense to phrase requirements related to timekeeping methods, client identity and statement of facts, priorities, and disclosure of case information as something separate and apart from restricted activity. It is less clear why restrictions on participating in certain events such as demonstrations, strikes, riots, etc. as outlined in §1612.7(a) and (b) or restrictions on political activities outlined in §1608 would be listed here. Those limits on recipients, currently listed in §1610.3 (b), (d), and (f) could well be listed under extended restrictions in §1610.2(d)(1).

Furthermore, it might make the regulation read easier if all restrictions and requirements could be found in the same section. This could involve creating a new subsection under §1610.2(d) or perhaps somewhere else in §1610.2. NLADA does not believe that clarity is improved by having “all” the restrictions laid out in §1610.2(d) only to have further requirements listed in a new subsection.

#### **§ 1610.4 Prohibitions on the use of non-LSC funds.**

The subsection on this prohibition was previously located at §1610.3. That section put a blanket ban on the use of non-LSC funds for any restricted activity and then referenced other sections as exceptions.

There appears to be no substantive change, but the proposed section does contain more information. It lays out the exceptions for authorized uses of tribal funds (any restricted activity) and public funds (“standard restrictions”) while also noting that the newly coined “limited restrictions” do not apply to any non-LSC funds.

Previously, the definitions of authorized use for public, tribal, and private funds were all listed separately in §1610.4 (a), (b), and (c). These definitions included the “in accordance with the specific purposes for which they were provided” language that is similar to the new “within the purpose for which the funds were provided” language. NLADA agrees that this revision is an improvement in that it that keeps “authorized use” as one definition that can apply to any non-LSC funding source. NLADA also believes the structure of the proposed §1610.4, which breaks down how different restrictions apply to different non-LSC funds provides greater clarity.

Again, however, NLADA believes that making a separate section for “requirements” is unnecessary. If LSC were to give those requirements in §1610.3 a specific title and list them out in §1610.2, LSC could also easily include them in §1610.4, noting that these requirements apply to all activities of a recipient, regardless of the funds used.

#### **§ 1610.5 Grants, subgrants, donations, and gifts made by recipients.**

This is an entirely new section, but it does not create any substantive changes. Rather, it cross references and summarizes §1627 on subgrants of LSC funds and §1630’s prohibition on making gifts and donations with LSC funds. This new section also clearly notes that neither of those rules apply to non-LSC funds. NLADA believes that adding the references to §1627 and §1630 increases clarity and ease of use in the larger regulatory framework. Explicitly noting that those are specific to LSC funds is also helpful.

**§ 1610.6 Exceptions for public defender programs and criminal or related cases.**

Although this section has changed the title to be more descriptive, restructured the language, and now cites to the relevant regulations themselves, this section has no substantive changes. NLADA applauds LSC's efforts to improve clarity for this section.

**1610.7 Notification to non-LSC funders and donors.**

The proposed §1610.7 in this revision is a slightly modified and renumbered version of the current §1610.5. It includes only minor line edits for clarity. NLADA believes these edits improve clarity, and we have no concerns as it relates to the revisions in this section.

**§ 1610.8 Program integrity of recipient.**

The proposed §1610.8 in this revision contains a renumbered version of the current §1610.7. It makes a minor change as it relates to subsection (a)(2), specifying that in order to have program integrity from another organization, a recipient cannot subgrant any LSC funds to such an organization. This change from the past language of "any funds" increases clarity and specificity. NLADA believes this is an important clarification and an improvement on the current section.

**§ 1610.9 Accounting.**

This section is a renumbered version of the current §1610.8. It breaks out what was once a single subsection into subsections (a), (b), and (c). And in doing so, the revised section adds new text, requiring that programs adopt written policies to implement the requirements of "this part," and that they maintain written records documenting their non-LSC funds used on any restricted activities, which is in keeping with current LSC policy. This section could be more explicit by saying that "this part" means §1610 as a whole and that by "restricted activities," it means the restrictions defined in §1610.2(d). Aside from that, NLADA believes the revisions improve upon the current text and adds clarity.

**§ 1610.10 Compliance.**

This is a completely new section that simply cross-references the enforcement powers of LSC outlined in §1630.16 in the event that funds are "improperly charged." NLADA believes a cross-reference to §1630.16 is a good idea, and we endorse adding this section. Still, we have concerns about the changes to §1630.16 that make it more difficult to understand while also expanding LSC's recovery options related to the use of non-LSC public funds. Those are discussed above.

Thank you again the opportunity to present comments regarding these important changes to the regulations.

Sincerely,

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National Legal Aid and Defender Association