



Sent by email to: lscrulemaking@lsc.gov

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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. 7518-7520 (February 10, 2020))

Dear Attorney Freedman,

This letter is submitted in response to LSC's Notice of Proposed Rulemaking (NPRM) requesting 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. These comments are submitted on behalf of the National Legal Aid & Defender Association (NLADA).

NLADA applauds LSC for their work on these sections as well as LSC's decision to hold a second comment period to ensure full public comment about an important substantive change. In this NPRM, LSC asks that comments proposing to "keep the gap" between § 1610 and § 1630 address the following questions:

1. Identify a valid purpose for the gap consistent with the statutory restrictions;
2. Explain why, for the LSC Act Restrictions, § 1630.16 should not apply to unauthorized uses of public funds that violate the LSC Act while continuing to apply to unauthorized uses of tribal funds that violate the LSC Act;
3. Explain why § 1630.16 should not apply to unauthorized uses of public funds that violate the LSC Act while continuing to apply to any uses of public funds that violate the restrictions in the LSC appropriation.

As it relates to the restrictions contained in the LSC Act, we continue to urge LSC to maintain the same enforcement powers on public funds that have existed since the passage of the LSC Act in 1974. Accordingly, we address LSC's three questions in order.

ON QUESTION 1: FILLING THE “GAP” WOULD BE INCONSISTENT WITH THE ORIGINAL STATUTORY INTENT WHILE ALSO POSING SIGNIFICANT RISKS TO LSC WITHOUT PRESENTING ANY SIGNIFICANT BENEFITS.

- a. *Reading the Statutory Exception for Public Funds as Giving LSC a Mandate for Enforcement is Contrary to the Statutory Construction and Original Intent of the LSC Act*

In the original LSC Act, restrictions are framed as limitations put on LSC funds. Section 1007(b), for example, states that “no funds made available by the Corporation” can be used for restrictions that are listed in subsections (1) through (11). The law goes further, however, limiting other funds in §1010(c). That section notes when “funds received by any recipient from a source other than the Corporation” are received for the purposes of legal assistance, those funds “shall not be expended by recipients for any purpose prohibited by this title.” This language seems to apply all LSC restrictions to any and all funds, but it is quickly followed by an exception on public and tribal funds. That exception reads:

[E]xcept that this provision shall not be construed to prevent recipients from receiving other public funds or tribal funds (including foundation funds benefiting Indians or Indian tribes) and expending them in accordance with the purposes for which they are provided, or to prevent contracting or making other arrangements with private attorneys, private law firms, or other State or local entities of attorneys, or with legal aid societies having separate public defender programs, for the provision of legal assistance to eligible clients under this title. (emphasis added)

As Congress debated the specific language for the LSC Act, this section served to show a clear intent for the LSC Act *not* to encroach upon the authority of other public or tribal funders.

It must also be noted that the original House bill had no such exception. In the Senate Conference Debate, Senators made explicit references to the exceptions for public and tribal funds while emphasizing how important such exceptions were. They made clear that the congressional intent of the exceptions for public funds listed in 1010(c) was for LSC to take a hands-off approach on this issue, allowing legal aid programs to continue receiving these critical funds without them being subjected to LSC regulation. This is made clear in numerous statements made by senators on the Senate Floor on July 18, 1974, the date the LSC Act was passed by Congress.

Senator Jacob Javits stated:

In particular, I am pleased with the chairman’s statement following statements by the managers in the House of Representatives to the effect that the prohibition contained in section 1010(c) on the use of nonpublic funds received by the corporation is subject to important exceptions: one relating to the source of funds and the other relating to the entity receiving the funds, whatever their source. This will permit the continuation of non-federal funding for entities such as the Legal Aid Society of New York without subjecting that funding to the restrictions contained in this bill. That society and others like it depend very significantly on contributions from the organized bar, as well as other

non-federal sources, and during the conference **we took care to insure that they and the other entities spelled out in the second exception, are exempt from the prohibition so that they can continue to receive funds as they do now, without restriction.**¹ (emphasis added)

Senator Alan Cranston of California stated:

First, it should be made clear that the use of public funds are excluded from this prohibition in section 1010(c) of the bill. Second, funds that are provided for the provision of legal services to Indians, even when those funds come from private foundation sources, are not covered by that section's prescription.² (emphasis added)

And Senator Ted Kennedy made clear:

Section 1010(c) limits recipients'—except those serving Indian populations—use of private foundation funds—as defined in the Internal Revenue Code—for purposes prohibited by this act. **This does not, of course, affect any public funds.**³ (emphasis added)

The placement of the exception in 1010(c) combined with the LSC Act's legislative history makes clear that the intent of Congress was for LSC to *not* regulate public funds. The original intent was for the restrictions in the LSC act to “not affect any public funds” and allow legal aid programs to continue to receive such funds “without restriction.” To parse out the words “in accordance with the purposes for which they are provided” as a restricting clause, allowing LSC to interpret the intent of public funders, potentially even contrary to that specific public funder's interpretation of their own conditions, would go against the statutory intent of the LSC Act. The more reasonable reading is that such language was added to make clear that, at the time the LSC Act was passed, even though public funds might be given for a purpose disallowed by the provisions of the LSC Act, LSC recipients would still be free to receive funds and spend them “in accordance with the purposes for which they are provided.”

Additionally, LSC regulating the intent of other funders would not be sound policy. It would require LSC to insert itself into state and municipal politics in order to decide not just what these other entities intended, but also what punishment should be enforced when a recipient has strayed from this intent. Even ignoring Congress' clear intent, this practice would be problematic for two reasons. First, it puts LSC in a difficult position legally, one in which it could spend considerable resources. Second, it offers little benefit to LSC.

b. Attempting to be the Arbiter of Another Public Funder's Intent Could Mire LSC in Costly Legal Challenges, Challenges in which they are Unlikely to Ultimately Prevail

Were LSC to extend its compliance and enforcement mechanisms to involve interpretation of what is and is not the intent of other public funders, LSC could be mired in legal battles.

¹ Senator Javits (NY). “The LSC Act.” Congressional Record 120:18 (July 18, 1974) p. 24028 or S12925.

² Senator Cranston (CA). “The LSC Act.” Congressional Record 120:18 (July 18, 1974) p. 24038 or S12935.

³ Senator Kennedy (MA). “The LSC Act.” Congressional Record 120:18 (July 18, 1974) p. 24057 or S129954.

Questions of federalism and the limits of federal agencies could prevent LSC from even taking action on the substantive changes offered in this proposed revision. This is not merely speculation or a hypothetical argument either. This has happened before.

In *NAT. CENTER FOR YOUTH LAW v. Legal Services Corp.*, 749 F. Supp. 1013 (N.D. Cal. 1990), an LSC recipient sued LSC in federal court and won on this very issue.⁴ In that case, the recipient engaged in advocacy which was permitted only if the grantee was using non-LSC public funds (or tribal funds) and using them for the specific purposes for which those funds were given. LSC conceded that the grantee used public funds, but nevertheless reduced their funding by 9.95 % based on its finding that there was a violation of the statutory conditions. LSC took the position that the recipient used the public funds in a manner that was not in accordance with the purposes for which those funds were given. The recipient asked their non-LSC public funder to weigh in; the funder determined that the advocacy was in fact within the purpose for which they granted the funds; LSC did not, however, back down, insisting that they disagreed with the public funder's determination.

It was at this point that the recipient took the matter to federal court. There, a United States District Court framed the "primary issue" as:

[W]hether LSC may review de novo a state agency's determination of eligibility for a state legal services grant program and supplant the state's decision with its own.⁵

The court held against LSC, ruling that their reduction of funding based on an alleged statutory violation was "arbitrary and capricious" and not based on "substantial evidence." This ruling rested on a separate finding that it was unlawful for LSC to reject the state funder's determination of their own intent for the funds they granted and, in doing so, insert LSC's separate, contrary opinion. The court stated:

The LSC Act contains no language on its face, and LSC has identified no Congressional authority, which would overcome the Court's proper reluctance to endorse a federal agency's de novo review of a sister state agency's determination under its own rules and regulations. Therefore, the Court finds that neither LSC nor itself may review and reverse the state Commission's determination that NCYL used the funds provided it for the purpose for which they were intended."⁶

Since that court ruling, NLADA is unaware of any other attempt by LSC to reduce or reclaim LSC funding on the grounds that a program used non-LSC public funds in a manner inconsistent with the purpose for which those funds were provided. Thus, NLADA is unaware of any time LSC has attempted to reduce or reclaim LSC funds on these grounds and ever been successful.

⁴ *NAT. CENTER FOR YOUTH LAW v. Legal Services Corp.*, 749 F. Supp. 1013 (N.D. Cal. 1990).

⁵ *Id.* at 1016.

⁶ *Id.* at 1017.

c. Inserting LSC between Recipients and their Non-LSC Public Funders has Little Upside and is Unlikely to Provide Significant Safeguards for LSC Funds

From a pragmatic standpoint, the only justification to take action that could potentially lead to difficult and protracted legal challenges over the intent of a third-party would be if such disputes were necessary or likely to serve as a significant safeguard of LSC funds. They are not.

To reach an opposing conclusion, one would have to make a series of assumptions that do not reflect the realities in the field.

First, one would have to assume that non-LSC public funders do not have their own compliance and enforcement mechanisms. This is simply not true. Other federal agencies, states, municipalities, and other public funders all care deeply about the funds they grant. They have their own sets of rules, requirements, and compliance mechanisms in place to monitor the recipients of their funds. If an LSC recipient is using non-LSC public funds in a way contrary to the purposes for which those funds were provided, the non-LSC public funder can and likely will take action. LSC should not make the mistake of believing they are the only funder engaging in compliance and enforcement when it comes to legal aid. LSC is not the only safeguard to ensure that funds are spent for the purposes for which they are provided. If the sole question is focused on the intent of the public funder, it would be prudent to let that funder's process for enforcement determine the outcome.

Second, one would have to assume that LSC recipients are in fact regularly engaged in the misuse of non-LSC public funds by engaging in activity that is (1) classified as a "standard restriction" and (2) not within the purpose for which those funds were given. NLADA is unaware of any recent examples of such misuse or even alleged misuse.

Finally, even assuming non-LSC public funders fail to engage in compliance and enforcement for their funds *and* LSC recipients are regularly engaging in this narrowly defined type of misuse of non-LSC public funds, this rule change would still not serve as an important safeguard of LSC funds. LSC already has appropriate enforcement mechanisms in 45 C.F.R. 1606. Specifically, 1606.3 allows for "limited reductions," "suspensions," and even "terminations" in funding for anything that is deemed "a substantial violation" by an LSC recipient. Additionally, 1606.6-1606.11 provide a procedure for determining when such violations have taken place as well as an appeals process. LSC can already take action against a program in the event that they believe a program is misusing funds to the extent that it is a "substantial violation." This action can be extreme ("terminations") or more measured ("limited reductions").

d. The Current Gap Serves Valid Policy Considerations Consistent with the Statutory Restrictions

The original LSC Act contains the phrase "public funds" only once, and in that single instance, it is mentioned to clarify that the LSC Act "shall not be construed" to prevent LSC grantees from using non-LSC public funds for activities that would be otherwise prohibited by the LSC Act. The entire purpose of its insertion is to give deference to non-LSC public funders and to avoid a conflict between LSC and other public funders.

Further, any attempt to recover LSC funds on the grounds that a grantee's activity violated the intent of a third party public funder sets up a difficult dispute for LSC, one that cannot be justified by an important policy goal. Public funders are already enforcing their conditions themselves, and LSC has other enforcement mechanisms available even if that is not the case.

The most prudent action would be for LSC to, in their words, "keep the gap." In fact, "closing the gap" would not serve any valid purpose supported by the statutory framework of the LSC Act.

ON QUESTION 2: IT IS NOT CLEAR THAT AN INCONSISTENCY BETWEEN TRIBAL AND PUBLIC FUNDS EXISTS, BUT IF ONE DOES, IT SHOULD BE RECONCILED IN THE DIRECTION OPPOSITE OF WHAT LSC HAS PROPOSED

It is unclear whether or not there actually is an inconsistency with how non-LSC public funds and funds from tribes are treated in the current § 1630.16. At minimum, the existence of such an inconsistency is questionable.

The original LSC Act mentions tribal funds in one section, § 1010(c). This is the same section that includes "other public funds." As with "other public funds," tribal funds are included in this section to clarify that LSC recipients may use tribal funds for activities otherwise prohibited by the LSC Act. Tribal funds do, however, contain an additional and important detail. Section 1010(c) describes tribal funds by stating, "tribal funds (including foundation funds benefiting Indians or Indian tribes)." A plain reading of this text would conclude that, for the purposes of § 1010(c), the term "tribal funds" would include both funds directly from Native American Tribes, which would be not considered private entities, and also funds from private foundations whose funds benefit Indians or Indian tribes. These foundations would be considered private entities, and their funds would be considered private funds.

This definitional question is important because the current 1630.16(a) reads as follows:

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. (emphasis added)

This subsection first seems to put a limit on all *private* funds, but then states that this limit on *private* funds does not extend to tribal funds used for the specific purposes for which they were provided. Why would tribal funds be included as a kind of private fund? It would be difficult to claim that funds that come directly from a sovereign tribal nation are a subset of private funds. The reference makes sense, however, if the text of this subsection is only addressing funds that come from "foundation funds benefiting Indians or Indian tribes." These funds, though most would consider them to be private funds, are not treated like other private funds in the LSC Act; they are considered tribal funds. The supplementary information to the regulation in the publication of the 1997 version (when the language first appeared) provides no explanation and LSC has not opined on this language at any time since. If the subsection is in fact only

addressing the “private foundation funds benefiting Indians or Indian tribes” and not funds which come directly from Native American Tribes themselves, the latter category of funds would in fact be treated identically to non-LSC public funds in the current version of 1630.16.

It is unclear whether the current 1630 treats funds directly from Native American tribes and non-LSC public funders inconsistently.

Regardless, to the extent that LSC believes there is an inconsistency in the how 1610 and 1630 apply to non-LSC public funds and tribal funds, NLADA urges LSC to reconcile any inconsistencies in the direction of deference to other public funders and sovereign tribal nations. All of the arguments listed in the section above in regard to non-LSC public funders apply to tribal funds. The only difference perhaps is that the difficult legal questions regarding whether LSC can overrule a funder’s determination of its intended purpose is perhaps even more fraught.

NLADA urges LSC to adopt a rule that does not place them in a position to second guess a tribe’s intent when they grant funds to a legal aid provider.

ON QUESTION 3: RESTRICTIONS IN THE LSC ACT ARE FUNDAMENTALLY DIFFERENT THAN THOSE IN THE LSC FY 1996 APPROPRIATIONS RIDERS AND CARRY A DIFFERENT INTENT FROM CONGRESS

LSC can enforce “extended” restrictions on LSC recipients. Such restrictions prohibit LSC recipients from engaging in certain activities, regardless of the funds used. These restrictions reach farther than those in the original LSC Act because that was the explicit intent of Congress.

The 1996 Appropriation Riders represent a specific congressional intent to restrict the activity of LSC recipients that is separate and apart from the restrictions in the original LSC Act. These two pieces of legislation are different and should be treated differently.

Nonetheless, the prospect of the extended restrictions are themselves less legally and logistically difficult to enforce than LSC’s proposed change to § 1610 and § 1630. In order to determine whether an extended restriction has been violated, LSC must answer two questions:

1. Is this entity a recipient of LSC funds?
2. Did this entity engage in activity prohibited by one of the extended restrictions?

To make such a determination, LSC must only interpret its own regulations and confirm that the program is in fact an LSC recipient. LSC is not required to interpret another public funder’s intent; LSC will not find itself in a position where it disagrees with another public funder about that funder’s mandate. There are no questions of federalism that could arise. The questions involve only LSC, its own rules, and a clear congressional mandate.

As the U.S. District Court in the 1990 case stated when it denied LSC’s ability to conduct a de novo review of a state agency’s determination:

Unless a statute provides a clear indication by Congress "that it envisioned federal superintendence of ... decisions traditionally entrusted to state governance," the limitations of the federal system are properly read into the LSC Act.

In this NPRM, LSC essentially asks why it is not justified in recovering funds for unauthorized uses of public funds which fund activities restricted by the LSC Act if it is justified in recovering funds for any use of public funds that violate the LSC FY 1996 Appropriations Riders. The answer is simple: because LSC has clear congressional authority to do the latter, but not the former.

CONCLUSION

The substantive change of 45. C.F.R. 1630.16 that LSC first proposed in the August 12, 2019 NPRM should be abandoned. It would insert LSC between legal aid organizations and other public funders in a way that goes against the clear statutory intent of the LSC Act.

The proposed change is likely to give rise to costly legal challenges, and it is unlikely to offer any benefit when it comes to safeguarding LSC funds. LSC appears to be under the impression that leaving the rule as it is perpetuates an inconsistency between how funds from tribes and public funds are treated in the regulations. Upon a careful reading of the LSC Act and the current regulation, NLADA disagrees that such an inconsistency exists. Even assuming that such an inconsistency does in fact exist, the appropriate response would be to treat tribal funds as public funds are currently treated, not vice versa. Finally, the fact that Congress, in 1996, gave LSC broader authority to enforce certain restrictions does not by itself change or expand the authority which Congress granted LSC as it relates to the restrictions in the 1974 LSC Act. LSC, in its enforcement of the specific provisions of the LSC Act, is still bound by the limits Congress placed upon it back in 1974.

For those reasons, we urge LSC not to adopt these substantive changes to 1630.16. When it comes to enforcing the restrictions in the original LSC Act, NLADA urges LSC to maintain the same policy on non-LSC public funds that it has had since the passage of the LSC Act and the founding of LSC itself in 1974.

Sincerely,

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