NLADA
National Legal Aid &
Defender Association

Sent by email to: lscrulemaking@lsc.gov

February 3, 2021

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RE: **Comments Concerning Proposed Revisions to 45 CFR Part 1635 Timekeeping Requirement** (85 Fed. Reg. 70564-70569 (November 5, 2021))

Dear Attorney Davis,

This letter is submitted in response to LSC's request for comments on proposed revisions to the regulations on LSC's timekeeping requirement, located at 45 C.F.R. 1635. These comments are submitted on behalf of the National Legal Aid & Defender Association (NLADA). They are our attempt to best represent the diverse views, thoughts, and concerns of NLADA's members. In preparing these comments, we consulted with our regulations committee as well as directors, staff, and financial officers from LSC recipients around the country.

NLADA applauds LSC for their continued work on updating LSC regulations and the effort put into this specific revision as LSC attempts to improve clarity and make important substantive changes. NLADA has comments on where we believe this revision is especially helpful, where it could create significant hardship for LSC recipients, and where we think it is too prescriptive. Comments are organized and addressed in the order of the proposed revised section numbers.

§1635.1 What is the purpose of this part.

NLADA concurs with LSC that this section contains only technical edits, ones which improve clarity and readability. We endorse the edits to this section.

§1635.2 Definitions

NLADA also endorses the changes made in this section. Whether it was technical changes or revising definitions to better track with the Case Service Report Handbook, the changes in this section will be helpful to LSC recipients. In particular, NLADA and its members were encouraged to see the addition of a new term, "case oversight," to this section. Most importantly, by affirming a broad definition of this term, LSC gives useful guidance and flexibility to LSC recipients and their supervisory staff on how they may bill a variety of tasks. It is especially helpful to have a definition that envisions this activity as something that can both be billed as a

"matter" when it encompasses the aggregate work on a number of different cases (such as reviewing multiple files for a retainer or citizenship attestation) or be billed as a "case" when it involves more extensive work on a single case (such as reviewing, in detail, the advice provided to a particular client).

§ 1635.3 Who is covered by the timekeeping requirement?

NLADA applauds LSC's effort to provide a clearer definition as to who must keep time in accordance with this regulation. Nevertheless, we find the proposed definition to be over-inclusive, covering a broader set of recipient employees than necessary to address the problems LSC identified with the current rule.

At present, "time spent by attorneys and paralegals" are subject to the timekeeping requirements. LSC correctly points out in the preamble that this rule introduces ambiguity because neither this regulation nor any other LSC regulation offers a clear definition for the position of paralegal. Meanwhile, programs do not all adhere to some universally agreed upon role for paralegals or a universal title for those who do paralegal-like work. As LSC notes in the preamble to this NPRM, some recipients employ staff who hold a title of paralegal but perform "only administrative work" while others employ staff who perform "substantive work" but do not hold the title of paralegal. In short, LSC has identified a problem where they "cannot be certain that part 1635 covers all recipient employees who are doing substantive work on the LSC grant."

If the problem stems from lacking a clear definition of the term "paralegal," the solution begs a definition of that term or, alternatively, the concept that term was attempting to capture. Yet, the proposed regulation also offers no definition of the term paralegal, and instead proposes extending the timekeeping requirement to a potentially much broader group of employees. NLADA understands that the past rule made no attempt to define the term paralegal, but that does not mean a modern definition is impossible or that attempting to create one would not be the most appropriate way of addressing this ambiguity. In fact, as recently as February of 2020, the America Bar Association (ABA) published its own definition for a paralegal. Their definition reads as follows:

> A paralegal is a person, qualified by education, training or work experience who is employed or retained by a lawyer, law office, corporation, governmental agency or other entity and who performs specifically delegated substantive legal work for which a lawyer is responsible.[1]

This definition is helpful because it covers individuals regardless of title or formal education or certification. It relates specifically to an individual who is doing "specifically delegated substantive legal work." To the extent that LSC has concerns that individual recipient employees are doing substantive work but are not covered because they lack the title of paralegal, this would rectify the problem. It also has the advantage of addressing the problem specifically, but not going broader than necessary. NLADA is not suggesting that the ABA's effort represents the only appropriate way to define paralegal. Rather, we supply it here to demonstrate that including such a definition is possible and would address the identified problems.

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[1] Current ABA Definition of Paralegal, *available at* https://www.americanbar.org/groups/paralegals/profession-information/current_aba_definition_of_legal_assistant_paralegal/

The current proposal, instead of defining the term paralegal, simply requires that "any recipient employee whose compensation is charged to one or more grants as a direct cost" is covered by the regulation. Given that LSC is, for most programs a minority funder, and that many programs receive a variety of different grants, requiring 1635 timekeeping requirements for each and every employee who has any portion of their compensation billed as a direct cost is overly broad. In the examples given in the preamble, LSC seems interested in only requiring timekeeping for those individuals who do specific legal work on client cases or advocacy-related matters, but this rule goes beyond that. It is even unclear whether or not administrative or support staff who assist with intake screening or similar processes would be covered under this rule. As written, it appears that the proposed rule might answer this question in the affirmative. If so, this would create a significant additional administrative burden on programs without a clear benefit to LSC.

NLADA appreciates LSC's efforts to clarify who is covered by the timekeeping requirement. Nevertheless, the on-the-ground situation for LSC recipients is complex and nuanced. As such, a rule that applies to anyone whose "compensation is charged to one or more grants as a direct cost" quickly becomes over-inclusive or even more ambiguous than the current regulation. We urge LSC to revisit this proposed rule or, at minimum, provide clarification in the text of the regulation to ensure that the regulation covers attorneys and those doing substantive legal work but not others, such as those doing intake screening or similar work.

§1635.4. What are LSC's timekeeping standards?

This proposed section contains a number of new timekeeping standards. Meanwhile, LSC proposes to remove the requirement that time entries be entered contemporaneously as well as the requirement that employees subject to this part document their time in increments no greater than one-quarter of an hour.

New Requirements in §1635.4(a)

The proposed § 1635.4(a) adds a number of new rules. Most of these new rules, however, do not actually add new requirements on recipients. Some of the subsections require that: the records comply with the recipients established accounting policies, they be part of the recipient's official records and that they reflect the total activity for which the recipient compensates an employee, including both LSC and non-LSC funded activity. For the most part, these are statements of general best practices and principles with which all LSC recipients already comply. Though a requirement that a program have "a system of internal control" to support their timekeeping introduces some level of vagueness into the regulation, NLADA does not object to most of these general principles, principles and requirements that, for the most part, LSC was already enforcing upon recipients in accordance with other fiscal requirements located in program criteria, OCE and OPP policy, and other regulations.

Still, there were a few subsections with which we have concerns, causing us to believe that they should be revised for clarity or removed.

In §1635.4(a)(4), LSC proposes a new requirement that time records must "encompass both LSC-funded and all other activities compensated by the recipient on an integrated basis." NLADA and the directors and financial officers with whom we spoke were not able to discern a

clear and universally agreed upon meaning of the term "integrated basis" in this context. If LSC simply means that time records for non-LSC and LSC activity should generally be located in the same case management system, then we have no objection, but there were questions within the field about the clear meaning of this subsection.

More concerning, however, was the implication of the sample time entry offered in §1635.4(a)(7)(ii). In discussing how one might enter a time entry for a "matter," the proposed regulation reads as follows:

> For example, if a recipient employee conducts a legal information session on filing a pro se divorce petition, the employee could record "pro se divorce group information session, 1.5 hours, LSC grant."

This example envisions a system where recipient staff are allocating their time to specific grants in real time on the front end. We understand this is just an example, but it implies that LSC is expecting individual staff attorneys to allocate their time to the LSC grant as they enter it into the case management system. This is not a realistic or reasonable expectation. LSC recipients often have cases or matters which could be billed to a number of different grants. As one recipient explained to NLADA, for a specific type of client in a specific type of case in a specific jurisdiction, the recipient may have nine possible funding sources to which the work could be billed. Situations like this are not rare outliers, which is why it is not reasonable or appropriate to expect staff attorneys to bill hours specifically to the LSC grant as they enter them. Instead, the case will include a code to note it is LSC-eligible (and/or eligible for other grants) so that fiscal staff are able to later allocate across funding sources based on the larger body of the recipient's work. It would be unworkable to expect LSC recipients to allocate specific hours to the LSC grant or other generalized grants on the front end. To do so, would require that all recipient employees have a complex understanding of the program's fiscal situation and the amount of work being done across the entire organization. Further, it would treat LSC like a fee-for-service or reimbursable grant that pays a set amount for each hour worked, which of course it is not.

The Removal of the Contemporaneously Requirement

In removing the "contemporaneously" requirement, LSC notes two concerns with the current rule in the preamble to the NPRM. Under the current rule, attorneys and paralegals were expected to have "records" about their time that would be "created no later than the end of the day." First, LSC acknowledges that the reality of legal services work, which often requires attorneys and paralegals to spend their days in court or traveling throughout the community, made it unreasonable to expect attorneys and paralegals to enter their time on a daily basis. Second, the regulation was unclear on what "records" meant. Did it mean to memorialize in a notebook, in a calendar, on a sheet of paper? Or did it mean to create a record in the recipient's official timekeeping system?

In this revision, LSC seeks to clarify both of these issues by providing a reasonable but clear timeframe for when records must be entered and to specify that the requirement is for entry into the recipient's official system. LSC requests comment on the question of what a reasonable timeframe would be, noting that they have considered timeframes that range from the end of the business day to the end of the pay period.

NLADA agrees that the entry into the official timekeeping records is the more appropriate activity for LSC to regulate compared to informal timekeeping practices. The unofficial timekeeping practices of individual attorneys to memorialize the time they spend in a contemporaneous manner will differ across programs, practice areas, and individuals. If LSC is seeking a consistent standard for all relevant employees of all LSC recipients, entry into the official timekeeping system should be the focus. Given that, the timeframe should be as flexible as possible. Recognizing that

1. many attorneys do the bulk of their work outside the four walls of their office and may not have time to sit and enter their hours in a timesheet every day;
2. legal services attorneys are notoriously overworked and are often dealing with a number of time-sensitive issues in a single day; AND
3. failure to enter time into the official timekeeping system does not mean that informal written records have not been timely created

NLADA would urge as long as possible of a timeframe for employees to enter time under this regulation. Our position is that the most appropriate standard would be one determined by the individual recipient. If LSC believes a set standard is in fact required, however, LSC's standard should be no shorter than by the end of the pay period. Given that this is a question of when hours must be entered into the official timekeeping system and does not exclude more informal timekeeping notations attorneys may make on a more ongoing basis, we see no need for a shorter time period to be required by the regulation.

Adding of Uniform Guidance in §1635.4(b) and §1635.4(c)

NLADA takes no position on whether or not to state the requirements from the Department of Labor regulations in LSC's own regulation. On one hand, it seems unnecessary to state other federal legal requirements within this regulation. On the other hand, doing so imposes no new additional requirements or burdens on LSC recipients.

NLADA also does not object to the requirement in §1635.4(c) that programs use the same documentation and standards when counting salaries for matching purposes as they do when allocating those salaries to the LSC grant. It is, on its face, a reasonable requirement and one with which all recipients likely already comply.

Nevertheless, NLADA does wish to express our concern on what we see as a growing trend of LSC to look to Uniform Guidance in regulating LSC recipients. Although an LSC basic field grant is an award of federally appropriated funds, we feel compelled to emphasize the critical relationship between LSC and its recipients is a unique one, not just in terms of regulatory oversight, but also in the centrality of the recipients to LSC's larger mission. LSC has a vested interest in the long term success of its recipients, their ability to secure additional non-LSC funding, and their ability to increase access to justice by serving as many eligible clients as possible, regardless of the funds they use to do so. This interest LSC has in its recipients and the relationship it has with them is unlike any other relationship between a federal funder and its grantees. As such, the Uniform Guidance, though useful in some contexts will never be a perfect fit for LSC programs, and so we wish to urge caution when considering the possible adoption of

any provision of the Uniform Guidance. NLADA strongly believes that it should not be incorporated into LSC regulations or policies when doing so would impose increased administrative costs or makes it more difficult for LSC programs to leverage LSC funds to secure additional non-LSC funds. In those situations, whatever increased oversight or large scale consistency the Uniform Guidance could provide would be counterbalanced by undermining the larger LSC mission of assisting its grantees to serving as many eligible clients as possible with the limited funds they have.

The Removal of the Increment of Time Requirement

The current rule requires all recipients to keep time in increments no greater than one quarter hour (15 minutes). Recognizing that different programs have different needs in regard to increments of time in a timekeeping system, LSC proposes removing this requirement. NLADA endorses this proposal. NLADA especially appreciates LSC's efforts to be sensitive to its role as a minority funder, its demands on recipients, and the demands of other funders. The preamble notes that "LSC recommends" still using increments no larger than 15 minutes in order to "maximize the accuracy of reporting." We would ask LSC to remove this wording in the final rule. If LSC has determined that the requirement is not necessary, keeping a recommendation in the preamble only serves to cause confusion. Will programs be asked to justify why they do not keep time in the "recommended" increments? Instead, we would ask for a clearer statement in the preamble that such a decision is entirely at the discretion of the program.

The Removal of the De Minimis Language

NLADA does not necessarily object to the removal of the de minimis language from the current §1635.3(d) and proposed §1635.4(e) to the extent that it does not represent any intent to substantively change the rule. In the preamble, LSC noted that removing this language does not "reflect a relaxation of the rule," but NLADA reads this change as a potential tightening of the rule. Under the current regulation, part-time employees must make the certification, but certain de minimis activities are exempted. In the proposed new language, there is no such exemption, and the text is, at best, unclear, if the exemption for de minimis activities still exists. NLADA would ask LSC to clarify their position on this rule.

§ 1635.5 What are LSC's standards for ensuring the proper allocation of employee compensation costs across grants?

This represents a new section for part 1635 and covers an entirely new topic. The proposed new § 1635.5 would require recipients to either "link" their payroll records to their case management systems or to manually "reconcile" the two. Immediately, there are two concerns.

First, it is unclear what LSC means by "link" and "reconcile." Do those terms simply mean that the total hours that an employee enters into the case management system must match the hours the employee entered into the payroll system? Or is there an expectation that the payroll records would have some further details related to specific types of work? The former would be

problematic and present a significant burden to many programs, but the latter would require a complete reworking of systems for nearly every LSC recipient. To be clear, NLADA opposes this change regardless, but the intended full extent of the proposal was not apparent from the text.

Second, it is also not clear what benefit this additional and significant burden provides to LSC. LSC notes that they have "experienced challenges in verifying" that salary costs charged to the LSC basic field grant were in fact "properly chargeable to the LSC grant" and that this rule represents a "method for ensuring the accuracy of timekeeping records and proper allocation of salaries and wages." The NPRM does not go into any further detail as to what those challenges have been or how the linking of payroll records and case management system records would address them. If case management records, including funding and case codes are not comprehensive and accurate, it is unclear how linking them to the payroll system fixes the problem. And if they are, it is not apparent why LSC would need them linked to the payroll system to verify a program completed a sufficient amount of LSC-eligible work based on their total budget, amount of LSC funding, and total work completed. This proposed revision requires a significant and unnecessary shift in fiscal policy for a large number of LSC recipients, one that would create considerable hardship, and it is unclear on our reading what, if any, clear benefit it offers to LSC.

Staff attorney positions at LSC programs are salaried positions, and the LSC basic field grant is not a fee-for-service or reimbursable grant. If staff attorneys work additional hours on a weekend or late at night on an LSC-eligible case, they do not receive any additional salary benefits. Likewise, LSC does not provide any additional funding for those extra hours. Full-time attorneys at LSC recipients almost universally work more than the required 35 or 40 hours a week that would qualify them as a 1.0 FTE. This is important because it demonstrates the problem in trying to tie the funds allocated to LSC based on salaries and hours worked. There is not an hourly rate for attorneys that can be reported to LSC based on annual salaries. To allocate direct costs to LSC, programs use a number of different methods. Some use percentage of cases and matters which are LSC-eligible or total hours worked on LSC eligible matters, methods that are especially appropriate where LSC is a minority funder and the vast majority of the recipient's cases and matters are documented as LSC eligible.

Beyond questions of those allocation methods, payroll records reflect attendance and whether or not an attorney worked a minimum amount of hours on a given day or whether they took personal time off in the form of vacation, sick, family, or other leave. As such, the payroll timesheets in some programs do not reflect total hours worked for attorneys; that level of specificity is not relevant to the attorney's salary and benefits and thus not included. That is not to say that the total hours worked are not accounted for in the case management system or that the program would be unable to allocate certain direct costs based off those hours. Nevertheless, the payroll records at many programs are not the place where such information is reflected nor does it need to be. Requiring such goes beyond the purview of a funder.

LSC is correct to insist that *a* timekeeping record exists somewhere to confirm hours worked on specific cases and matters and whether or not that work was LSC eligible. This ensures that direct costs can be properly allocated to the LSC basic field grant and other funding sources. The

burden is always on a recipient program to have a system in place so they can demonstrate that LSC-funded staff performed LSC eligible work as an appropriate percentage of their time. Doing this through a payroll system and/or confirming that payroll records and case management systems match is one possible way to do that, but it is not the only way. LSC recipients across the country use different payroll systems, different case management systems, and different funding allocation processes. Given the diversity among programs in terms of size, number of funding sources, and types of funding sources, this all makes sense. It is not a sign that some programs are doing it "the right way" while others are not.

The proposed §1635.5 is an overly prescriptive solution that attempts to impose a one-size-fits-all approach to direct cost allocation. It would require extensive additional administrative costs, is not necessarily the most sensible approach for salaried staff working on the basic field grant, and would not necessarily provide any clear benefit when it comes to accurately allocating direct costs across funding sources.

§1635.6 Administrative provisions. Who outside the grantee has access to these records?

NLADA concurs with LSC that the proposed changes to this section are only stylistic. We have no objections to these stylistic changes.

Conclusion

NLADA once again wants to thank LSC for their efforts in engaging in the hard and important work of revising these regulations as well as the opportunity to comment. We appreciate the open and collaborative effort with which LSC approaches these challenges, and we look forward to further discussion on these and other issues important to the field. Our final comment is that we request that, to the extent any final rule makes changes to how programs must keep time or allocate to the LSC grants, we ask that any changes take effect no sooner than 2022. Legal services programs are in the midst of one of their most challenging years and would not be well served to have adapt even further on short notice. Thank you for your consideration.

Sincerely,

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National Legal Aid and Defender Association