



Sent by email to: financialguide@lsc.gov

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3333 K Street NW
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RE: Comments Concerning Legal Services Corporation Financial Guide; 86 Fed. Reg. 348, Pages 71288 – 71290 (December 15, 2021)

Dear Attorney Davis,

This letter is submitted in response to Legal Services Corporation's (LSC) request for comments on the proposed revised draft of the LSC Financial Guide. These comments are submitted on behalf of the National Legal Aid & Defender Association (NLADA) and its members. These comments are based on the knowledge, experience, and insight of our program members, which include the vast majority of LSC grantees. In preparing these comments, NLADA consulted with CFOs of LSC grantees in addition to executive directors and other individuals who sit on the NLADA Regulations Committee. These experts represent a diverse group of programs in terms of location, size, sophistication, and other factors. Over a number of virtual meetings, NLADA received valuable input about how differently situated grantees craft fiscal policy and balance the complex requirements from a host of different funders.

NLADA appreciates the work LSC has done in revising the previous draft of the LSC Financial Guide in response to public comment. We also wish to thank LSC for the opportunity to further comment on this new draft and share the input we received from our members representing LSC grantees from across the country. While the main focus of the instant comments pertain to the new sections identified in the most recent request for comments, we also find it necessary to highlight some additional revisions to the previous draft (not enumerated in the Notice but new revisions since the last comment period), and their effect on grantee programs.

We also want to reiterate our more general comment on what we see as the most appropriate and beneficial use of a guide such as this. In light of the diversity among LSC grantees as well as the fact that LSC remains a minority funder for many of its grantees, this guide is best in the places where it acts as a source of generalized guidance and not as a basis for LSC to bestow additional rules and requirements on its grantees.

I. New Requirements for Policies to Be Approved by Governing Bodies

A number of the new additions in this revised draft are focused on having specific written policies approved by “the recipient’s governing body.” In many instances, LSC grantees already have such a written policy and some of those grantees may even have the policy approved by their governing body. Still, it is generally inappropriate to require with such specificity which policies need approval from a grantee’s governing body. Beyond that general objection, we find some of the specific policies for which this draft guide requires governing body approval to be particularly unnecessary.

For example, a grantee’s governing body already approves the Private Attorney Involvement (PAI) plan, a plan which must be in place in accordance with 45 C.F.R. 1614. It is unnecessary and possibly redundant to formally require that programs have their governing body approve additional policies on how to calculate PAI expenses and determining whether the PAI requirements were met.

In another example, the revised guide requires that a grantee’s policy on cost principles be approved by the governing body. Decisions on how to handle cost principles are issues best left between accounting staff and the grantee’s auditors. Finally, §1.3—Recipient Responsibility now requires that “[a]ny policies and procedures implementing the requirements of this Guide must be written and approved by the recipient’s governing body.” This wholesale requirement is too broad and too prescriptive.

NLADA appreciates the result LSC desires with these requirements: a governing body that is aware of a grantee’s fiscal policies and whether the grantee is in compliance with them. Nevertheless, by essentially requiring that any and all fiscal policies (or even any policies that could be tangentially related to fiscal policy) are approved by a grantee’s governing body, LSC is increasing the chance of an opposite result.

Governing bodies are already tasked with “engag[ing] in strategic organizational planning... major policy decisions...” and “holding organizational management accountable for effective performance of their responsibilities.”¹ To perform these key duties, governing bodies will have to review certain policies, offer their input on them, and approve them when they are acceptable. If, however, they are tasked with giving their approval of every policy on how the day-to-day accounting is run, the grantee and its governing body will have less time for more meaningful board oversight on the larger strategic decisions and issues facing the organization.

There is a risk that the board will be overrun with matters that do not warrant their input and become more of a rubber stamp than a deliberative body when it comes to policy review. As the number of policies to approve increases, a governing body is likely to spend less time per policy in their review. Accordingly, at some point, there are diminishing returns on the value of each

¹ LSC Performance Criteria, Area 4: Effectiveness of governance, leadership and administration, Criterion 1: Board Governance, available at <https://www.lsc.gov/our-impact/publications/other-publications-and-reports/lsc-performance-criteria>.

additional policy a governing body must approve. The guidance in this draft goes well beyond that point. We encourage LSC to think about the benefit of governing body approval for policies on an individual basis and avoid any requirements for the governing body to approve “any and all” of a certain type of policy or procedure.

II. General Requirements in Accounting Systems

This new draft includes, in §2.1.1 and §2.1.1.a, more specifics about generalized accounting system requirements and the capabilities that a grantee’s accounting system must have. NLADA has no objections to these sections, and appear to provide an appropriate level of guidance that helps grantees follow accepted guidelines and precautions to keep detailed and accurate financial records while not being overly prescriptive as to how that must be accomplished.

III. Time, Attendance and Reconciliation

This revised draft also includes changes to § 2.2.2—Time and Attendance (Payroll) and § 2.2.3—Reconciliations. NLADA continues to be concerned by guidance aimed at ensuring “employees are paid only for hours worked.” Naturally, we agree that hourly employees should be paid based on the number of hours worked. The vast majority of employees at legal services organizations, however, are not hourly employees; they are not paid based on “hours worked” and instead are salaried employees who are “exempt” under the Wages and Fair Labor Standards Act. Other than when specific exceptions exist, the Wages and Fair Labor Standards Act dictates that exempt employees “must receive the full salary for any week in which the employee performs any work, regardless of the number of days or hours worked.”² Pay determinations based on “hours worked” would force LSC recipients to pay overtime pay or be subject to a violation of federal labor law.

Statements like the one cited above continue to express an approach to time, attendance, and payroll that does not make sense for legal services organizations based on the reality of how pay is and is not calculated. We infer that LSC’s goal is simply to ensure that grant funds are allocated based on actual work, but asking programs to make efforts so that “employees are only paid for hours worked” is not the appropriate framing in which to approach that goal.

This also touches on NLADA’s continued questions on how LSC plans to approach reconciliation. The revised §2.2.3 is an improvement on this topic, especially where it notes that reconciliation of labor cost distribution reports must be reconciled by “supporting documentation, such as...” (and, we infer from the syntax here, not necessarily) “...individual timekeeping reports.” Later in the same paragraph, however, LSC writes that “recipients must reconcile timekeeping reports with the labor cost distribution reports on an annual basis, at a minimum.” This leaves the requirements unclear.

² U.S. Department of Labor, Wages and Hour Division, Fact Sheet #17G: Salary Basis Requirement and the Part 541 Exemptions Under the Fair Labor Standards Act (FLSA), available at <https://www.dol.gov/agencies/whd/fact-sheets/17g-overtime-salary>.

We support LSC’s stated goal that all grantees must be able to “document, at a minimum, that LSC funding is properly being used to pay the costs of an employee’s time spent working directly on LSC-eligible activity.” Our concerns are that this guide may require that grantees carry out this important task in a specific way, one which would require additional and unnecessary administrative costs for certain programs. In regard to reconciliation, we expressed this concern in our comments on the last draft of this guide and on a proposed section (since removed) in the recent proposed rulemaking on timekeeping, located at 45 C.F.R. 1635.

On the prior draft of this guide, we said:

Rather than simply require programs to have appropriate accounting procedures to ensure proper allocation, the guide wants to institute a one-size-fits-all approach to all grantees on exactly how they should go about doing so. This kind of top-down requirement creates a micromanaging of accounting methods that would be inappropriate in a regulation, let alone a guide.

On the proposed section of 45 C.F.R. 1635 that dealt with a similar (but different) proposed requirement for reconciliation we said:

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.

...

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.

NLADA wants to emphasize our position that the current §2.2.3 represents an improvement from the prior draft and we appreciate the thoughtful changes that were made. Still, some of the concerns expressed in our last round of comments, along with the concerns expressed in our past comments on the proposed 1635, still remain.

All of our comments can be distilled to the same principle: *grantees must be able to document and prove appropriate allocation, but the exact method they use to demonstrate such allocation should not be prescribed by LSC.*

IV. Security for Physical and Electronic Records

LSC's decision in the initial draft to add a section covering cyber security was a prudent one. Electronic threats now pose a much more significant risk to the financial security of grantees than they did before. In this more recent draft, LSC added a number of questions and bullet points to guide grantees' efforts in creating and adhering to sound data security policies. Most of these additions are unobjectionable, but they include one bullet point with the question: "Is a risk assessment performed and documented at least annually?" NLADA urges LSC to remove or revise this point.

First, it is unclear what a "risk assessment" entails. Grantees have information technology staff who conduct assessments of some risks on a weekly or even daily basis. These very same grantees might also apply for a grant that would provide funding for 12 months or even longer to review all possible cybersecurity risks along with potential solutions. Surely, this kind of assessment is not one LSC envisions grantees conducting each and every year. Second, this bullet point creates an overly formalistic approach to how grantees assess risk, suggesting it should be done on a certain timeline. It is not helpful to direct or, in this case, recommend to grantees that they perform and document a "risk assessment" at least once a year. Instead, a more appropriate recommendation would be that grantees should regularly and meaningfully assess how their organization protects against security risks.

V. Prior Comments

In addition to the sections on which LSC specifically requested comments, there were two sections that LSC revised in this draft that NLADA believes warrant further comment.

In the prior draft, §2.5.1.a — Responsibilities of the Financial Oversight Committee, had a requirement related to the timesheets of a grantee's executive director. Specifically, it required that those timesheets be approved by the governing body's financial oversight committee. NLADA objected to that in our prior comments, and we were pleased to see the addition of the footnote in this section, adding a more practical option. That footnote reads as follows:

If not reviewed by the Financial Oversight Committee, the Executive Director's timesheets must be reviewed by someone at an appropriate level of management who has knowledge of the Executive Director's daily activities.

This represents a significant improvement, one that NLADA and its members appreciate. Still, we believe the language could benefit from a minor revision. As it is currently worded, the text could be read to always require that the governing body approve an executive director's timesheets and this other option in the footnote is what needs to be done in the event that the

grantee has already failed to meet the requirement. NLADA would propose wording that makes clear that either the financial oversight committee OR “someone at an appropriate level of management” reviewing the executive director’s timesheets are both acceptable options.

In §3.7.3.a — Meals and Refreshments, LSC is adding another event in which grantees can use LSC funds to pay for meals and refreshments beyond “courtesy coffee, tea, and similar beverage and minor refreshments.” That event is, of course, board meetings. NLADA appreciates this change and the flexibility it gives to grantees. Providing meals to board members who might be attending meetings after work hours or during meal times is, in many places, considered common courtesy. This change recognizes that LSC’s refusal to fund such meals could make it harder for grantees to retain high quality board members.

And yet, the section, as written, still would forbid the use of LSC funds on meals for staff who are working overtime or as part of some other work related event. Given the small amount of funds at stake on this issue, the rule feels unnecessarily harsh. NLADA understands LSC’s desire to have a bright line rule, but given how rare it is for grantees to be misusing funds for food and beverage, a subjective standard of “work related events” or even something as broad as “reasonable” would provide sufficient protection of LSC funds. This revision recognizes the value in using small amounts of funds to help make high quality board members feel valued. A similar revision should be made that recognizes the importance of doing the same on behalf of high quality staff. We continue to urge LSC to rethink their position on grantees’ ability to expend LSC funds to feed staff members in a reasonable manner.

VI. Conclusion

Despite our listed concerns, NLADA wants to state our appreciation for the Corporation’s efforts thus far to respond to public comment and the revisions already made. LSC’s efforts in responding to formal public comment as well as seeking out further comment at conferences has resulted in an improvement in the financial guide. Nevertheless, NLADA still sees room for improvement, specifically in the sections we noted above. As this process comes to a conclusion, we urge LSC to look at this document with an emphasis on guidance and flexibility as opposed to formalistic rules for all grantees to follow. In doing so, we hope LSC will continue to keep their grantees in mind, a group that is diverse in terms of size, funding sources, geographic locations, and many other ways.

Sincerely,

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